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WITH AN APPENDIX OF FORMS AND TABLES OF COSTS.

BY

FREDERICK WALTON ATKINSON, LL.D.(LOND.),

SOLICITOR OF THE SUPREME COURT.

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(Elem. Jur. sec. 1286.)

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PREFACE.

In these days of excellent text books, written by learned specialists upon nearly every branch of the law, one is forced to recognise that to justify a new publication, it ought to supply a distinct want; and the question at once arises whether this little work does or does not fulfil that condition.

In the course of my duties as London Agent for country and colonial solicitors, I have had occasion to obtain charging orders and assert liens both on funds and papers; and I have not found it easy to find all the law and practice required without considerable research not in two or three books only, but in many, and it occurred to me that it might be a help to busy lawyers, both in town and country, if the fruits of those researches were brought together into one small volume with the addition of forms of the various proceedings and of bills of costs allowed on taxation.

The subject of this little book is of considerable practical importance to solicitors, and yet so far as my experience goes, it is not so fully and readily known by them as it might be; and the reason is not far to seek. It is two-fold: in the first place solicitors though laudably zealous for their clients' interests are not so careful about their own; and, secondly, the ordinary average honesty of clients stands high, so that it is not often that solicitors find much trouble in obtaining payment of the costs earned by their arduous and anxious labours.

Still exceptions are found to this general rule, and sometimes through the dishonesty or misfortunes of abnormal clients it is necessary to resort to rights of lien and charging orders to recover costs against trustees in bankruptcy, liquidators, purchasers, mortgagees, executors and other persons in whom the clients' property may have become vested, and if on such occasions this work should prove of service to my professional brethren, by, so to say, turning bad debts into good ones, I shall not have laboured in vain.

Such as this book is I commit it to the candid judgment of our profession, feeling as I do that it must stand or fall accordingly.

40, Finsbury Square, London,
June, 1905.

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Page 3 . . . . In eighth line of second paragraph for "1856" read "1858," and in first line of third paragraph for "four" read "two."

Page 13, note (*o*) . . For "1868" read "1869."

Page 15 . . . . *Add*, "In Divorce cases a charging order can be made against money secured to the wife on dissolution of marriage, but the Court will not make the order unless the solicitor shows that he cannot obtain payment in any other way: *Harrison* v. *Harrison*, 13 P. D. 180, and (on appeal) 58 L. J. P. D. 28."

Page 16, note (*e*) . . *Add*, "See also *Pierson* v. *Knutsford Estates Co.*, (1884) 13 Q. B. D. 666; *Re Wheal Rose*, (1885) 29 Sol. Jo. 222; and *Turnbull* v. *Richardson*, (1885) 29 Sol. Jo. 239."

Page 23 . . . . *Add*, "In an Irish case a charging order was made on proceeds of sale of the estate of a deceased person realised by the solicitor under an order of the Court, notwithstanding that a balance was due to the estate by the client as executrix, which she was unable to bring into Court: *FitzSimon* v. *White*, 17 L. R. Ir. Ch. 223; but see *Staniar* v. *Evans*, pp. 55 and 71, *post*."

Page 24 . . . . *Add*, "The solicitor of a plaintiff in an action to whom the defendant had been ordered to pay costs obtained a charging order *nisi* upon a share of a fund in Court belonging to the defendant, which fund had been recovered through the exertions of the defendant's solicitor. It was held that the charging order should only be made

absolute subject to the lien for taxed costs of the defendant's solicitor: *Haymes* v. *Cooper*, *Cooper* v. *Jenkins*, (1864) 33 L. J. Ch. 488."

Page 25 . . . . *Add*, "In an action for winding up a partnership, a receiver was appointed and sold goods belonging to the partnership which might have been distrained for rent, and the plaintiff's solicitor obtained a charging order for his costs on the proceeds. The landlord gave the receiver notice of his claim for rent before the charging order was made, but it was held that, as he had not distrained, the solicitor's charging order took priority over his claim: *Re Suffield, exp. Brown*, (1888) 20 Q. B. D. 693."

Page 31 . . . . In the eleventh line of the second paragraph for "(1813)" read "(1815)."

Page 40, note (*u*) . . *Add*, "See as to the enforcing order by sale: *Re Green*, (1885) 26 C. D. 16; and *Rowley* v. *Southwell*, (1889) 61 L. T. 805."

Page 43 . . . . *Add*, "As to the defendant being ordered to pay the costs where he colluded with the plaintiff to deprive the plaintiff's solicitor of them: see *Exp. Games, in re Williams and Lloyd*, (1864) 33 L. J. Ex. 317."

Page 45 . . . See also *Re Graydon*, (1896) 1 Q. B. 417, as to charging order in bankruptcy.

Page 49 . . . . *Add*, "In divorce cases until a *decree nisi* has been made there is no *lis pendens* with reference to the property included in the marriage settlements, so any charge (or lien) created before the *decree nisi* is valid, and the Court will provide for it on extinguishing the interest of the person creating it: *Wigney* v. *Wigney*, (1882) 7 P. D. 228."

Page 49 . . . . *Add*, "The words of the Workmen's Compensation Act, 1897, are as follows:—

"'Any sum awarded as compensation shall be paid on the receipt of the

person to whom it is payable under any agreement or award; and his solicitor or agent shall not be entitled to recover from him, or to claim a lien on, or deduct any amount for costs from the said sum awarded, except such sum as may be awarded by the arbitrator or county court judge on an application made by either party to determine the amount of costs to be paid to the said solicitor or agent, such sum to be awarded subject to taxation and to the scale of costs prescribed by rules of Court." '

It is very difficult to interpret this obscure section, and it has not yet been the subject of judicial construction.

Page 52 (end of Sect. III.) *Add*, "The costs of the liquidator's solicitor have priority over the liquidator's remuneration: *Re Sanitary Burial Association*, (1900) 2 Ch. 289."

Page 53 . . . . *Add*, "See as to charging order under Solicitors Act, 1860, being made subject to defendant's solicitor's lien on funds: *Haymes* v. *Cooper*, *Cooper* v. *Jenkins*, (1864) 33 L. J. Ch. 488."

Page 56 (end of Sect. IV.) *Add*, "The trustee in bankruptcy cannot recover from the debtor's solicitor money paid to him by the debtor on account of his costs of opposing the petition: *Re Sinclair*, *exp. Paine*, (1885) 15 Q. B. D. 616; and see *Re Spackman*, *exp. Foley*, (1890) 24 Q. B. D. 728."

Page 58, note (*n*) . . *Add*, "See also *Wyman* v. *Paterson*, (1900) A. C. 271."

Page 64 . . . . *Add* at end of first paragraph, "See also *Watts* v. *Hetley*, (1900) 44 Sol. Jo. 134."

Page 71 . . . . *Add*, "See as to lien preventing set-off of taxed costs against debt: *Mercer* v. *Graves*, (1872) L. R. 7 Q. B. 499."

Page 73, note (*c*) . . *Add*, "See also *Re Lumley*, (1893) 37 Sol. Jo. 83."

Page 77, note (*z*) . . *Add*, "See also *Stedman* v. *Webb*, (1839) 8 L. J. Ch. 193."

Page 86, note (*q*) . . *Add*, "See also *Turner* v. *Letts*, (1855) 24 L. J. Ch. 638."

Page 88, note (*d*) . . For "(1868)" read "(1869)."

Page 91 : . . . . *Add*, "Where a mortgagor sold his equity of redemption and filed his petition, the solicitor for the mortgagor (who was also solicitor for the mortgagee and trustee in bankruptcy) was held to have a lien on the deeds for costs due from the mortgagor : *Re Messenger*, (1876) 3 C. D. 317."

Page 94 (end of Sect. III.) *Add*, "If a solicitor acquires as against his client a negotiable instrument of which his client is holder, he *may* have a better title than his client *sed qu.: Redfern* v. *Rosenthal*, (1902) 86 L. T. 855."

Page 95, note (*l*) . For "*Irving* v. *Viana*, (1842)" read "*Irving* v. *Viana*, (1827)."

ge 100, note (*i*) . . *Add*, "See also *Re Walker*, (1893) 37 Sol. Jo. 242."

Page 101 . . . . *Add*, "As to inspection, it was held in *Lockett* v. *Cary*, (1864) 10 Jur. N. S. 144, that the client had a right to inspect the documents notwithstanding the solicitor's lien, but in *Re Biggs and Roche*, (1897) 4 1 Sol. Jo. 277, Kekewich, J., refused to make an order for inspection on the ground that the lien would be practically destroyed if the client were allowed to inspect. The right to take copies follows of course from the right of inspection : *Pratt* v. *Pratt*, (1882) 51 L. J. Ch. 840."

Page 104, note (*b*) . . *Add*, "But he does not discharge himself by refusing to appeal : *Austin* v. *Macnamara*, (1895) 40 Sol. Jo. 71."

Page 104, note (*e*) . . *Add*, "but not if he merely becomes embarrassed and keeps out of the way : *Re Smith*, (1861) 9 W. R. 396."

Page 113, note (*f*) . . *Add*, "But see *Colmer* v. *Ede*, (1870) 40 L. J. Ch. 185."

Page 118 . . . . . *Add*, "The application should be entitled in the matter of the action or matter in which the solicitor was employed : *Re Marie Rose Co.*, (1896) W. N. 76."

Page 125 . . . . As to action of trover against the agent, see *Bray* v. *Hine*, (1818) 6 Price, 203.

Page 125, note (*o*) . . *Add*, "The Council of the Incorporated Law Society in a circular to the members in December, 1902, expressed the following views :—

"'Allowances between solicitors.—Many inquiries having been addressed to the Council on the subject of allowances between solicitors, they have for some time past been engaged in ascertaining the practice in the provinces, and in Scotland and Ireland. In the result they have expressed the opinion that it is not illegal or contrary to professional etiquette for an arrangement to be made under which an English solicitor takes some interest in the profits of business introduced or entrusted by him to an Irish, Scottish, or colonial solicitor who does the work necessary to be done in his own country, or under which an English solicitor allows a like interest to an Irish, Scottish, or colonial solicitor in respect of work done by the English solicitor in England.

SOLICITORS' LIENS AND CHARGING ORDERS.

INTRODUCTION.

Definition of lien.

Blackstone defines a lien as "the right of a bailee to retain possession of a chattel entrusted to him until his claim upon it is satisfied." The late learned author, Mr. Joshua Williams, Q.C., in his book on the Law of Personal Property puts it better thus: "A lien is the right of a person in possession of goods to retain them until a debt due to him has been satisfied." Mr. Whitley Stokes in his treatise on the Liens of Attorneys and Solicitors, published in 1860, gives a two-fold definition of "lien," which he derives from *ligamen*. He says, "the first kind of lien is a right to retain possession of another's property until a debt due to the person retaining has been satisfied; the second kind of lien being a right to charge property in another's possession with the payment of a debt, or the performance of a duty."

Distinct from debt.

A solicitor has, in addition to his right to bring an action of debt for the amount of his costs, a right to retain the property that has come to his hands in the course of his employment, a right to retain as well as a right to sue, a *jus in rem* as well as a *jus in personam*, a right of property in the lien as well as an obligation binding on the client personally towards himself.

It is the right of retention or lien alone with which we are concerned in the present work.

Three kinds of solicitors' liens:

We shall see that the law on this subject of lien may be conveniently divided into three main divisions, firstly,

1. Lien on papers.
2. Lien on funds.
3. Charging order.

the lien on papers, deeds and other documents; secondly, the lien on funds and other property; and thirdly, the statutory charging order which was created by the Solicitors Act, 1860, s. 28; and, for the sake of brevity, we shall throughout this work call these three rights by the short names respectively of "lien on documents," "lien on funds," and "charging order."

General liens and special liens.

A lien may be either special or general. A general lien is a lien to secure, not only the debt incurred in the particular matter in which the property subject to the lien was obtained, or recovered, but also to secure all other debts and the general balance of account.

We shall see later on that a solicitor has, as a general rule, subject to but few exceptions, a general lien on documents, but only a special lien on funds (*a*), and in the case of the statutory charging order only a special charge on the specific property recovered or preserved.

Active or passive.

A cross division of the subject occurs thus: a lien may be either passive or active. A lien is passive where the solicitor has no right of selling or otherwise realising the property subject to the lien or charge, but has the bare right of detaining or remaining in possession of the property until his claim is satisfied; in fact, only such a right as a landlord distraining for rent had at common law before the statute gave him a power of sale. An active lien, on the other hand, gives the solicitor the right of realising the property, at least by order of the Court, and in some cases without it; for example, a solicitor cannot realise his lien on his client's deeds by selling them, because his lien is only passive, but he can realise his lien on a judgment recovered by him against his client's debtor by obtaining an order from the Court directing the debtor to pay the amount to the solicitor instead of to the client, the judgment creditor, the reason being that the lien on funds recovered is not barely passive but active.

(*a*) *Bozon* v. *Bolland*, (1839) 4 My. & Cr. 354.

Origin of law of lien.

The law of solicitors' lien is derived from the common law and the practice of the Courts of equity, and not from any statutes. It is not very ancient; indeed, according to Lord St. Leonards (*b*), it is comparatively modern, and Mr. Whitley Stokes in his admirable work says that the earliest reported case in favour of the lien on documents is in the reign of James II., and the first case relating to the lien on funds much later; but before the end of the eighteenth century, the lien of solicitors, both on documents and funds, was well established both at law and in equity.

Decision of House of Lords in *Shaw* v. *Neale*.

One question at least, however, was not settled, viz., whether a lien on funds recovered extended to real estate. Lord Hardwicke and other eminent Judges held that it did, and that a solicitor who had recovered land for his client had a lien upon the land just as he would have had a lien upon money or stock recovered. Other Judges, however, took a different view, and it was not till the year 1856 that the question was set at rest by the House of Lords in the case of *Shaw* v. *Neale* (*c*), where it was held that an attorney obtaining a verdict for his client in an action of ejectment had no lien for his costs on the real estate so recovered. Many of the reasons on which that decision was based were considered unsatisfactory, but since the statute we are about to mention was passed, they no longer possess much practical interest.

Solicitors Act, 1860, s. 28, passed in consequence.

Charging order.

In the year 1860, that is, four years after the decision of the House of Lords in *Shaw* v. *Neale*, the Solicitors Act of that year was passed, and by the 28th section it was provided that where a solicitor shall be employed to prosecute or defend any action or other proceeding in any Court of justice it shall be lawful for the Court to give him a charge upon the property, whatsoever may be its nature or tenure, which shall have been recovered or preserved through his instrumentality, for his costs;

(*b*) *Blunden* v. *Desart*, 2 Dru. & War. 427.
(*c*) 6 H. L. Ca. 581.

and the Court has power to give directions for realising and paying the amount of such charge by sale or otherwise. There is a saving clause in favour of a *bonâ fide* purchaser for value without notice, and a proviso that a charging order shall not be made in any case where the claim for costs is barred by any statute of limitations. For the full text of this section see p. 8, *post.*

The power given to the Courts by this Act has been exercised freely and in a liberal spirit in favour of solicitors; for instance, we shall see later on that the Courts have decided that a charging order may be obtained against property recovered or preserved even where the solicitor was not employed by the owner of the property but by a third person, so long as the owner has been benefited by the solicitor's services and expenditure to this extent, that his property has been either *recovered or preserved.* In such a case the solicitor's claim is treated as being in the nature of salvage. The remedy has been applied to all kinds of property both real and personal, even where it belonged to persons under disability, such as infants, married women restrained from anticipation, trustees in bankruptcy, and liquidators. Orders have also been made to secure not only the amount of the solicitor's bill of costs, but also the costs of obtaining the charging order, and even the costs of establishing the solicitor's retainer, where that has been disputed.

Charging order is discretionary.

The order is not a matter of right but in the discretion of the Court, which, however, is not an arbitrary discretion, but one judicially exercised according to settled principles, just as the discretion to give or withhold specific performance of contracts is exercised. Examples of the exercise of this discretion will be found in certain cases cited later on.

Courts have always favoured liens of solicitors

The Courts have always looked with favour on solicitor's liens both on documents and funds, and also on charging orders, with a view to the furtherance of justice,

not only by preventing unprincipled clients from defrauding their solicitors, but also as tending to keep open the Courts of justice to poor men, as encouraging the solicitor to do his best for his client, and as being in fact no less beneficial to the public than to the solicitors themselves (*d*).

Choice of terms "lien on documents" and "lien on funds."

In a work of this kind, which is intended to be a practical handbook for practising lawyers, a lengthy discussion on a matter of mere nomenclature would be out of place, but we have thought it only respectful to our predecessors—very learned and able ones—in this branch of the law to explain, firstly, why we have substituted the terms "lien on documents" and "lien on funds" for the expressions "retaining lien" and "charging lien"; and secondly, why we have divided this book into the three main divisions of lien on documents, lien on funds, and charging orders, instead of into general lien and particular (or special) lien.

As to the first point, it is, we submit, not logically correct to differentiate the lien on documents from the lien on funds by calling the former a "retaining lien" and the latter a "charging lien," when the epithet "retaining" might with equal propriety be applied to both classes, for it is obvious that a solicitor's lien on moneys recovered for his client is sometimes a retaining lien, where, for instance, he has actually received in cash the amount recovered from his client's debtor; and with regard to the term "charging *lien*" there is a risk of confusing it with the term "charging *order*," which it resembles dangerously in sound, but from which it is quite distinct, both in its origin and in many of its properties and consequences.

As regards the second point, the division of the subject into general and particular liens is, we suppose, justified

(*d*) *Exp. Nesbitt*, 2 Sch. & Lef. 279, Lord Redesdale; *Exp. Bryant*, (1815) 1 Mad. 52, Plumer, M.R.; *Jacobs* v. *Latour*, 5 Bing. 130, Best, C.J.

by the consideration that the lien on documents is usually general and the lien on funds is for the most part particular; but there are important exceptions to these general rules. To mention two, the lien on documents is special only when it is asserted by a solicitor who is a town agent against the country solicitor, and the town agent's lien on funds is practically general as between himself and the country solicitor, though as against the country solicitor's lay client this general lien is limited to the extent of that client's indebtedness to the country solicitor.

We of course recognise to the fullest extent how proverbially difficult it is to frame terms and definitions that will cover every case, but we hope that our terminology and arrangements will be found to be conformable not only to logical precision, but also to practical convenience.

To resume, in this work we deal with the solicitor's remedy for his costs by liens and charging orders—what writers on scientific jurisprudence would call his right *in rem*. We do not touch otherwise than incidentally his remedy by action of debt, his right *in personam*. The subject is divided into three main divisions—(I.) Lien on Documents, sometimes called "retaining lien"; (II.) Lien on Funds, sometimes called "charging lien"; and (III.) Charging Orders under the Solicitors Act, 1860.

Order of exposition of subject.

If this were a book for students, the natural course would be to adopt this order of exposition, but as both the subject of this work and the work itself are only fit for practitioners, we have thought it better to consult practical convenience rather than logical symmetry, and reverse this arrangement. The three chapters are therefore dealt with in the following order:—(I.) Statutory Charging Orders under the Solicitors Act, 1860, s. 28; (II.) Liens on Funds; (III.) Liens on Documents.

The first chapter is divided into the following sections: (1) The nature of the charging order, including in this chapter the points of difference between this order and the lien on funds. (2) What property is liable to be charged by this order. (3) What persons can obtain it. (4) What persons are liable to have this order made against their property. (5) For what claims or demands the order can be made. (6) The effect of lapse of time, including the Statutes of Limitation. (7) Certain other grounds upon which the order can be resisted. (8) Jurisdiction, and procedure to obtain and enforce the order.

The two following chapters are subdivided upon analogous principles, and a fourth has been devoted to town agents.

CHAPTER I.

SECT. I.

STATUTORY CHARGING ORDERS UNDER THE SOLICITORS ACT, 1860.

As a charging order is a creature of the statute we will proceed at once to quote the very words of the section and then see how it has been interpreted by judicial decision.

Charging order under Solicitors Act, 1860, s. 28.

The words of the Solicitors Act, 1860, s. 28, are as follows:—

"In every case in which an attorney or solicitor shall be employed to prosecute or defend any suit, matter, or proceeding in any Court of justice, it shall be lawful for the Court or Judge before whom any such suit, matter, or proceeding has been heard, or shall be depending, to declare such attorney or solicitor entitled to a charge upon the property recovered or preserved, and upon such declaration being made, such attorney or solicitor shall have a charge upon and against, and a right to payment out of the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or preserved through the instrumentality of any such attorney or solicitor, for the taxed costs, charges, and expenses of or in reference to such suit, matter, or proceeding; and it shall be lawful for such Court or Judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or Judge shall appear just and proper; and all conveyances and acts done to defeat, or which shall operate to defeat, such charge or right, shall, unless made to a *bonâ fide*

purchaser for value without notice, be absolutely void, and of no effect as against such charge or right; provided always, that no such order shall be made by any such Court or Judge in any case in which the right to recover payment of such costs, charges and expenses is barred by any statute of limitations."

In the first place it will be observed that the operation of a charging order under the Act very closely resembles the lien on funds which we have seen was established by the Courts of law and equity quite a hundred years before the Act was passed, but we must not allow ourselves to be led astray by this resemblance. The two things are perfectly distinct in their origin, their subject-matter, as to the persons who can obtain them, the persons against whom they can be obtained or asserted, and the grounds of resistance. The following noteworthy differences will be found in the succeeding chapters:—until the charging order is actually pronounced there is no charge in existence; in the words of Lord Selborne in *Pinkerton* v. *Easton* (*a*), "The Legislature has not given a charge, but a power to the Court to create a charge, for a solicitor's costs, upon property recovered or preserved, when meritorious services of the solicitor have resulted in such recovery or preservation." A lien on funds, on the contrary, is acquired by the solicitor *ipso facto* the moment property has been recovered or preserved by his proceedings (*b*). Again, a charging order can be made on real estate, whereas a lien cannot be claimed against it (*c*). A town agent cannot get the charging order; he can assert a lien: The granting or refusing a charging order is in the discretion of the Court, whereas a lien is *ex debito justitiæ*. It is true that a lien is "an application to the equitable

Charging order quite distinct from lien.

Principal differences.

(*a*) (1873) L. R. 16 Eq. 490.

(*b*) *Lord* v. *Colvin*, (1862) 2 Dr. & Sm. 82, Kindersley, V.-C.; *Day* v. *Day*, (1857) 26 L. J. Chan. 585, L.JJ.

(*c*) *Shaw* v. *Neale*, 6 H. L. Ca. 581.

interference of the Court," but still that interference is always exercised in a proper case as a matter of right. A charging order will be made only on the net balance coming to the client or party benefited : whereas there are cases in which the Court has refused to allow a set-off to be opposed to the solicitor's lien even since the coming into operation of Order LXV. r. 14, of the Rules of 1883. When making a charging order or afterwards the Court has power to provide for the raising and payment of what is due to the solicitor by sale of the property or otherwise, whereas there is no decision to the effect that it can do this in aid of a solicitor's lien, though it can in such a case direct money owing to the client to be paid to the solicitor either by the opposite party or out of a fund in Court. A charging order will be made only to secure costs incurred in any Court of justice, whereas a solicitor has the lien on moneys recovered by proceedings before arbitrators, even where the submission has not been made a rule of Court.

On applying for a charging order it is not necessary to prove either express notice of the solicitor's lien or collusion, but to successfully assert a lien either notice of the lien or collusion must be proved. The charge created by an order is always special—that is, it can only be given to secure the costs in that particular proceeding in which the property was recovered or preserved, and cannot be extended to the general balance of account, or even to costs in other matters. A lien, on the other hand, may sometimes be general, for instance as between town agent and country solicitor (*d*). Last, but not least, the Statute of Limitations is a fatal answer to an application for a charging order, whereas it does not prejudice the lien on funds in any shape or form.

It will be seen from these differences that in some

(*d*) *Lawrence* v. *Fletcher*, (1879) 12 C. D. 858, Fry, J. ; *Re Jones and Roberts*, (1905) March 20, varied Apl. 15, on App. ; *Re Maud*, (1890) 34 Sol. Jo. 709, Chitty, J.

cases the charging order is more favourable to the solicitor than the lien, whereas in other instances the lien is more beneficial than the charging order.

A charging order is probably retrospective (*e*) in its operation; a lien certainly is so (*f*).

It will be noticed that the word used in the section is "charge," not "lien"—"shall have a charge"—so the effect when the order is made is practically the same as if the client had by contract given the solicitor an equitable mortgage over the property to secure his costs (*g*); indeed, it is very like the charging order given to a judgment creditor by the statute 1 & 2 Vict. c. 110, ss. 14 and 15.

Resemblances between the two.

At the same time the resemblances between the charging order and the lien on funds are so close and striking that the decisions on the one are a powerful aid to reason when questions arise on the other. This consideration should be continually borne in mind when looking up cases about either charging orders or liens, so that for exhaustive researches the cases relating to both should be examined.

Sect. II.

WHAT PROPERTY IS LIABLE TO BE CHARGED BY THIS ORDER.

To ascertain what property can be charged we must have recourse to the words of the Act of Parliament, which are—"upon the property recovered or preserved . . . the property, of whatsoever nature, tenure, or kind the same may be, which shall have been recovered or

(*e*) *North* v. *Stewart*, (1890) 15 App. Ca. 452, H. L.
(*f*) See cases as to garnishee orders, p. 53, *post*.
(*g*) *Waterland* v. *Serle*, (1897) W. N. 163, App.

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preserved through the instrumentality of any such . . . solicitor."

Every kind of property can be charged by order,

These words are as wide and comprehensive as could well be devised to include every kind of property real and personal, and one would have been tempted to add "corporeal and incorporeal," but we must draw the line here, for it was decided over thirty years ago (*h*) that an action which relates to an easement only is not a proceeding in which property can be said to be "recovered or preserved," within the meaning of the Act. This decision seems anomalous, for there would appear to be no more solid reason for excluding incorporeal *real* property from the benefit of the Act than incorporeal *personal* property such as choses in action, which have repeatedly been held to be within this section and capable of being charged accordingly. However, this decision, given by a Court of Appeal is binding until overruled by the House of Lords.

except an easement.

As before mentioned, the power to create a charge under the Act has been freely and liberally exercised by the Courts upon the various kinds of real and personal property which are capable of being recovered through a solicitor's skill and zeal. Where real property was recovered in an action of ejectment the Court made an order under the Act charging the estate with the solicitor's costs of that action, although two years had elapsed since the writ of possession had been executed and in the interval the plaintiff had died, and the Court of Chancery had made a decree in a creditor's suit for the administration of his real and personal estate (*i*). In another case a charging order was made on real estate of which the client was mortgagee for the costs of a foreclosure suit conducted by the solicitor, who applied for the charging order (*k*). Again where a beneficiary brought a

Real estate.

Foreclosure.

(*h*) *Foxon* v. *Gascoigne*, (1874) 9 Ch. App. 654 ; 43 L. J. Chan. 729.
(*i*) *Wilson* v. *Hood*, (1864) 3 H. & C. 148, Ex.
(*k*) *Wilson* v. *Round*, (1863) 4 Giff. 416.

suit against a trustee for an account and reconveyance, and a receiver was appointed adversely to the trustee, but the plaintiff and defendant compromised the suit and refused the plaintiff's solicitor all information, the Court made a charging order upon the plaintiff's property (*l*).

Partition.

So in a partition action a charging order was made upon a one-third share of an estate recovered by the plaintiff, and the Court by injunction restrained the plaintiff from receiving any money by way of compromise or otherwise without notice to the solicitor, and the defendants gave an undertaking in similar terms not to pay any money to the plaintiff without giving a similar notice (*m*). The removal of an incumbrance from an estate has been held to be property "recovered or preserved," even if the incumbrance was worthless, if it formed a cloud upon the title, and a charging order was made accordingly (*n*). In the case of an interest of a co-owner of real estate, which estate had been exonerated from claims and charges, it was held that the solicitor by whose proceedings such exoneration had been effected was entitled to a charging order (*o*). The obtaining of a declaration of title under the Declaration of Titles Act entitles the solicitor to a charging order on the estate, and so does a partition obtained in a partition suit, and the same rule applies to a suit for a declaration of lien (*p*). A solicitor for an executor defending successfully a hostile creditor's administration action was held entitled to a charging order, and so was the solicitor for a voluntary liquidator who saved the property of the company from execution creditors by

(*l*) *Twynam* v. *Porter*, (1870) L. R. 11 Eq. 181; *Baile* v. *Baile*, (1872) L. R. 13 Eq. 497.

(*m*) *Lloyd* v. *Jones*, (1879) 40 L. T. 515, Fry, J.

(*n*) *Re Fiddey*, (1872) L. R. 7 Ch. App. 773, L.JJ.

(*o*) *Scholefield* v. *Lockwood*, (1868) L. R. 7 Eq. 83.

(*p*) *Pritchard* v. *Roberts*, (1873) L. R. 17 Eq. 222.

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proceedings under the Joint Stock Companies Arrangement Acts (*q*).

Probate action.

In the Probate Division of the High Court, where an executor propounded a will which was disputed but its validity was established, and the executor then ceased to employ the solicitor, the Court made a charging order upon the assets of the testator, but held that it had no power to stop the issue of the probate (*r*).

Chattels.

The Court has also made a charging order upon chattels agreed to be given up after proceedings were taken for their recovery (*s*).

Where the solicitor of an administrator brought an action of detinue to recover goods which however the defendant sold, and the proceeds of sale were afterwards paid into Court in an administration action, the Court treated the money as "property recovered or preserved," and made a charging order in favour of the administrator's solicitor (*t*). Costs directed to be paid out of a fund in Court (*u*) in the Chancery Division are "property recovered or preserved" within the meaning of the Act; so is money paid into Court in an action, even if paid in to abide the event (*x*), and so all the foregoing are the proper subjects of a charging order. So are receivers' balances paid into Court (*y*).

Money in court.

Fruits of compromise.

Where money is paid by way of compromising an action, and is substantially the fruits thereof, it is treated as money "recovered" (*z*): see p. 60, *post*.

Where costs have been ordered to be paid by one

(*q*) *Re Dickenson*, (1888) W. N. 94; *Re John Clayton Limited*, (1905) 92 L. T. 223; *Re Burton*, (1903) 1 Ir. R. 124.

(*r*) *Heap* v. *Jackson*, (1886) W. N. 192; *Exp. Tweed*, (1899) 2 Q. B. 167.

(*s*) *Briscoe* v. *Briscoe*, (1892) 3 Ch. 543.

(*t*) *Catlow* v. *Catlow*, (1876) L. R. 2 C. P. D. 362.

(*u*) *Re Brook, Pilcher* v. *Arden*, (1878) 7 C. D. 318.

(*x*) *Emden* v. *Carte*, (1882) 19 C. D. 311, App.; *Clover* v. *Adams*, (1881) 6 Q. B. D. 622; *Moxon* v. *Sheppard*, (1890) 24 Q. B. D. 627.

(*y*) *Re Knight*, (1892) 2 Ch. 373, Kekewich, J.

(*z*) *Ratcliff* v. *Swift*, 32 Sol. Jo. 787; *McLarnon* v. *Carrick-on-Fergus U. D. C.*, (1904) 2 I. R. 44.

party to the other, but have been ordered to be repaid by the Court of Appeal, such costs are money "recovered" by the appellant's solicitor (*a*). A charging order has been made on a testator's property for the costs of the executor's solicitor, who successfully established the validity of the will against parties contesting it (*b*).

Where a solicitor has proved a claim in the winding up of a company, or in an administration action, he can obtain a charging order on the dividends payable to the claimant, as property "recovered": see p. 45, *post*.

Admiralty action.

In the Admiralty Division of the High Court, similar principles have been applied to those obtaining in the Chancery and King's Bench Divisions. Where an action *in rem* was brought against the ship, and the solicitor for the owners got the action dismissed, and afterwards another action was instituted for necessaries furnished after the institution of the former suit, the Court gave to the solicitor for the owners in the first action a charging order in priority (*c*), not only to the claim for necessaries, but even to the master's claim for wages. Again, in the case of an action for wages and disbursements by the plaintiff as master, where the plaintiff was held to be entitled to 103*l.* on this account, but the Court also decided that the defendant was entitled to 173*l.* by way of counterclaim for the price of a share in the ship agreed to be purchased by the plaintiff, the Court gave to the plaintiff's solicitor a charging order on the share of the ship for his costs not exceeding the 103*l.* as property "recovered or preserved," as the result of the suit to the plaintiff was that he was entitled to a transfer of the share in the ship for a less sum than he would have been if the suit had not been instituted (*d*).

In the following cases, however, the Court refused a

(*a*) *Guy* v. *Churchill*, (1887) 35 C. D. 490, App.
(*b*) *Exp. Tweed*, (1899) 2 Q. B. 167.
(*c*) *The* "*Heinrich*," (1871) L. R. 3 A. & E. 505.
(*d*) *The* "*Phillipine*," (1866) L. R. 1 A. & E. 309.

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charging order, on the ground that no property had been "recovered or preserved":—The case of an easement mentioned on p. 12, *ante*. Money paid into Court as security for costs by the client of the solicitor seeking the charging order was held to have been imperilled rather than "preserved," and an order was consequently refused (*e*); possibly it might have been granted if the same solicitor who paid it in had afterwards "recovered or preserved" it by succeeding in winning the action. Merely getting the trustee's accounts brought into chambers in an administration suit, and obtaining an order appointing a new trustee, is not "recovering or preserving" property (*f*). The successful opposition to a winding up petition is not "recovering or preserving" the property of the company (*ff*).

Not usually on money paid in as security for costs.

Where after payment into Court with a denial of liability, the defendant succeeded in establishing a counterclaim, it was held that the charging order must be limited to the net balance recovered, and did not extend to the gross total of the plaintiff's claim.

Charge on net balance only where counterclaim.

If money is paid into Court with a denial of liability, and the plaintiff elects to continue the action, and does not take the money out, it is not "recovered or preserved" then though it may be at a later stage (*g*).

Sect. III.

What persons can obtain the charging order.

The words of the Act are:—". . . an attorney or solicitor . . . employed to prosecute or defend any suit,

(*e*) *Re Wadsworth*, (1885) 29 C. D. 517, Kay, J.; but see *Parry* v. *Parry*, 30 Sol. Jo. 386.

(*f*) *Pinkerton* v. *Easton*, (1873) L. R. 16 Eq. 490, Selborne, C.; *Greer* v. *Young*, (1883) 24 C. D. 545, App.; *Re Viney*, (1868) 18 L. T. N. S. 851, Giffard, V.-C.

(*ff*) *United Shepherds Co.*, (1885) W. N. 15.

(*g*) *Westacott* v. *Bevan*, (1891) 1 Q. B. 774, Div. Ct.

matter, or proceeding in any court of justice" . . . "property" . . . "recovered or preserved through the instrumentality of any such attorney or solicitor."

Solicitor must not be mere volunteer, but need not have been employed by same person as the one whose property is sought to be charged.

The Act says that the solicitor must be employed, but does not say by whom; hence he must be *bonâ fide* employed by *some one*, he must *not* be a mere volunteer, but he need not necessarily be employed by the person whose property is sought to be charged by the order, so long as that property has been "recovered or preserved through his instrumentality," by proceedings in a Court of justice. This interpretation of the Act is now thoroughly established by a series of decisions, of which it will be useful to give a brief outline.

Bulley v. *Bulley* (1878).

In *Bulley* v. *Bulley* (*h*), the Court of Appeal, consisting of Sir George Jessel and Lords Justices James and Cotton, explained this as follows:—The principle of the Solicitors Act of 1860, s. 28, is analogous to the principles of salvage, and gives a charge on the property recovered or preserved, irrespective of any question as to who is the owner of it, and the fact that the client by whom the solicitor was retained is not the beneficial owner of the whole property is immaterial. Therefore, where a solicitor had been retained by a person interested in an estate, as to two-fifths in his own right, and as to three-fifths as a trustee for others, and the whole estate had been preserved, the Court made an order under this statute as against the *cestuis que trustent*, charging the whole property preserved; and this charge was not liable to be encumbered or affected with any equities that might exist between such trustee and his *cestuis que trustent*, even though the trustee were a defaulting trustee or bankrupt.

Sir George Jessel, Master of the Rolls, in giving judgment, said:—"The point really decided by the Vice-Chancellor was this: There was an ejectment bill brought

(*h*) (1878) 8 C. D. 479 App.

by the plaintiff in *Bulley* v. *Bulley*, to recover fifteen acres of land. . . . John Bulley was a devisee of trust estate under the will of William Bulley, who was the sole trustee under the will of one Richard Bulley the younger, who devised the estate in question, which was partly freehold and partly copyhold, to William Bulley, his heirs and assigns, upon trust to pay an annuity of 40*l.* to his wife for life, to divide the residue among five people, including himself; and after the death of the wife, upon trust to sell, with a discretionary power to William Bulley, his heirs and assigns, to postpone the sale. John Bulley, as such devisee, became, therefore, trustee of the estate under Richard Bulley's will, and as such, entered into possession, and divided the rents among the parties entitled in fifths, including the present appellant. They took their shares from John Bulley as such trustee. . . . The Lords Justices considered the suit on its merits, held that the plaintiff's contention failed, and therefore they established, in effect, the title of John Bulley as trustee under the wills I have mentioned, and the title also of the *cestuis que trustent* claiming under these wills. The result was a declaration in favour of everybody claiming under these wills, adversely to the contention of the plaintiff, who claimed an estate tail, under a title paramount. That being so, the whole of the property was preserved, by the solicitor of John Bulley, from the attack made upon it by the plaintiff in the suit of *Bulley* v. *Bulley*."

Lord Justice Cotton concurred:—"I am also of opinion," he said, "that the decision of the Vice-Chancellor was right. The question turns upon the construction of sect. 28 of the Solicitors Act, with reference to the particular facts of the case. That section does not say that a charge is to be given against the interest of the parties by whom the solicitor is employed, but that when the solicitor is employed to prosecute or defend any suit, it shall be lawful for the

Court to give him a charge for his costs, charges and expenses, on any property 'recovered or preserved' ('preserved' is the material thing here) through the instrumentality of any such attorney or solicitor. Of course, it means by his defence to the suit. . . . But the claim made by the plaintiff was one which would have swept away the estate under the wills under which the defendant Bulley claimed. He had the estate vested in him as trustee, and his answer says that he entered into possession, and dealt with the rents of the property as trustee. I have no doubt that his defence was for the benefit of all those interested in the estate, and that it was preserved to them by his defeating the claim of the plaintiff."

Greer v. *Young* (1883).

Greer v. *Young* (*i*) is another leading case. There property belonging to infants and others had been lost by a breach of trust committed by Pollock. Pollock and Young, being trustees and executors of the will of Greer, Pollock having died insolvent, in an action to administer his estate, Young, as surviving trustee of Greer, claimed in respect of the amount of Pollock's breach of trust, and was declared entitled to a dividend. A suit was then successfully instituted by the *cestuis que trustent* under Greer's will for a declaration that Young and Pollock were jointly and severally liable for Pollock's breaches of trust, and for the appointment of new trustees of Greer's will in the place of Young and Pollock. A dividend was received by the new trustees from Pollock's estate, and a dividend was declared on the estate of Young, who was bankrupt. The solicitor of the plaintiffs in the second suit obtained from Mr. Justice Chitty (notwithstanding the opposition of the new trustees, who represented the still infant *cestuis que trustent*), a charging order on the dividends received and to be received by the trustees. It was held (affirming the decision of

(*i*) (1883) 24 C. D. 545, App.

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Mr. Justice Chitty) that, although the solicitor had been employed in the second suit only by *cestuis que trustent* other than the infant, he was entitled to a charge on the whole of any dividends which might be received from Young's estate, on the principle that he had rendered salvage services, and that the infants' share of any dividends to be recovered from Young's estate was subject to the charge. . . . But it was also held (reversing the decision of Mr. Justice Chitty), that the decree in the second suit only provided the hand to receive the dividends from Pollock's estate, and was not "recovery or preservation" of those dividends. . . .

The Master of the Rolls (Brett), in giving judgment, said:—"The section does not, of course, allow a solicitor to go in as a mere volunteer to recover or preserve property; but, if any one has *bonâ fide* employed him to do so, there is nothing in the section to confine the charge to the interest of the employer in the property recovered or preserved. . . ."

Bowen, L.J., said:—"The section is very general, and applies in terms to all cases in which a solicitor is employed, and enables a charge to be made, not on the mere interest of the plaintiff, but on all the property recovered, whether for the plaintiff alone, or for himself and others. It is a salvage section. The solicitor lawfully employed is treated as a salvor. . . . I think the section gives the Court a discretionary power to make the charge, and does not give the solicitor an absolute right to the order. . . . The current of authority seems to me to be in favour of a liberal construction of the section, which involves rewarding the meritorious conduct of the salvor; and *Bulley* v. *Bulley* and *Pinkerton* v. *Easton* show that great lawyers are in favour of such a construction."

Scholey v. *Peck* (1893).

More recently, in the case of *Scholey* v. *Peck* (*k*), the

(*k*) (1893) 1 Ch. 709.

facts were as follows:—The plaintiff in an action for specific performance of an agreement relating to house property succeeded in establishing his right thereunder to an assignment of a certain house. Before the commencement of the action the plaintiff had, by a certain indenture, charged the property comprised in the agreement with the payment to another person as mortgagee of certain principal moneys and interest. The mortgagee, in the course of negotiations with the plaintiff's solicitors, declined a proposal made by them that she should either join in the expense of prosecuting the action or release her charge. After the decision of the action the plaintiff's solicitors presented a petition under the Solicitors Act, 1860, s. 28, for a charging order on the property preserved by the action for their costs thereof. Mr. Justice Romer held that the property had undoubtedly been preserved by the action; that the case was governed by *Greer* v. *Young*, and that the plaintiff's solicitors were accordingly entitled to the charge they asked for, not only as against their own client, the plaintiff, but also as against the mortgagee, who had reaped the benefit of the action without being a party to it.

In his judgment he said:—"What is recovered by the solicitor is to be treated as being in the nature of salvage, and that he is to be paid for his services on that theory. Sect. 28 authorises a charge not merely on the plaintiff's interest, but on all property recovered in the action, whether for his benefit, or that of others. In the present case, the property was undoubtedly preserved by means of the action. In my opinion, the case is really governed by *Greer* v. *Young*. My judgment therefore is, that these solicitors are entitled to the charge they ask for, not only as against the plaintiff, but also as against the mortgagee, who is taking the benefit of the action, though unwilling apparently to bear her share of its expenses. Except for the proceedings taken by the solicitors, her security would have been lost

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altogether. As regards the question of what costs ought to be included in the charge, I think it must include the costs, charges and expenses properly incurred in preserving the property. Having regard to the peculiar circumstances of this case, these costs should not include the whole costs of the action, or of the counterclaim, and, as the parties consent, I will, in order to save expense, deal with the question now, and declare that the solicitors are to have a charge on No. 111, Pembroke Road, for their costs, charges and expenses of the action down to and including the defence, and I direct that their costs of the petition [for the charging order] are to be taxed as between solicitor and client, and added to their charge. The mortgagee must have her costs of the petition, which she will be at liberty to add to her security. The petitioners will have liberty to apply for the purpose of enforcing their charge."

The principles laid down in these three cases are now the received doctrine of all the divisions of the High Court and an earlier decision to the contrary effect must be considered as overruled (*l*).

Infant's next friend.

A solicitor for the next friend of an infant can obtain a charging order as against the infant's interest in the property (*m*). The fact that a solicitor has been discharged is no objection to his obtaining the order (*n*), nor even the fact that he has discharged himself if he had reasonable grounds for so doing (*o*); but in either case the charge given him by the order will be subject to the lien of the new solicitor who succeeds him (*p*); in

Priorities of successive solicitors.

(*l*) *Re Thornhill*, 36 Sol. Jo. 218, was decided on special circumstances; *Berrie* v. *Howett*, (1869) L. R. 9 Eq. 1, is virtually overruled by *Charlton* v. *Charlton*, (1883) 49 L. T. 267, North, J.; and see also *Bailey* v. *Birchall*, (1865) 2 H. & M. 371, Wood, V.-C.

(*m*) *Baile* v. *Baile*, (1872) L. R. 13 Eq. 497, Wickens, V.-C.; *Pritchard* v. *Roberts*, (1873) L. R. 17 Eq. 222.

(*n*) *Re Brook, Pilcher* v. *Arden*, (1878) 7 C. D. 318, App.

(*o*) *Clover* v. *Adams*, (1881) 6 Q. B. D. 622.

(*p*) *Re Wadsworth, Rhodes* v. *Sugden*, (1887) 34 C. D. 155, Kay, J.; *Cormack* v. *Beisly*, 3 De G. & J. 357, Hatherley, C.

other words, the solicitor who acts for the client when the fund is recovered has the prior charge upon the fund for his costs; and if the former solicitor receives out of the fund in Court costs earned by the latter solicitor, the Court has summary jurisdiction to order the former solicitor to pay the latter his costs so earned (*q*).

Charging order cannot be obtained for collateral end.

The charging order was given by the Legislature for the benefit of solicitors, and will not be made for the benefit of clients to enable them to get costs payable by them to their own solicitors, charged on a fund where the Court administering the fund had not given such costs to the clients (*r*).

Town agent.

A town agent cannot have a charging order as against the lay client (*s*), but possibly he may have as against the country solicitor (*t*). Even if the agent cannot, however, have a charging order he has a lien on funds (*u*), and also a lien on documents (*x*), and both these liens are general as against the country solicitor, but limited to the extent of the indebtedness of the lay client to the country solicitor (*y*).

Representatives, assigns, mortgagees, &c.

The personal representatives of a deceased solicitor can obtain a charging order (*z*); and so can a mortgagee or other assignee of the solicitor's bill of costs.

(*q*) *Exp. Bailey and Hope, Re Barnard*, 14 Beav. 18, Langdale, M.R.

(*r*) *Harrison* v. *Cornwall Minerals Ry. Co.*, (1884) 50 L. T. 452, Kay, J.

(*s*) *Macfarlane* v. *Lister*, (1888) 37 C. D. 88, App.

(*t*) *Tardrew* v. *Howell*, (1862) 31 L. J. Chy. 57.

(*u*) *Lawrence* v. *Fletcher*, (1879) 12 C. D. 858, Fry, J.

(*x*) *Re Maud*, (1890) 34 Sol. Jo. 709; *Re Jones and Roberts*, (1905) April 15, App.

(*y*) *Lawrence* v. *Fletcher*, *ubi supra*; *Re Maud, ubi supra*; *Re Jones and Roberts, supra*.

(*z*) *Baile* v. *Baile*, (1872) L. R. 13 Eq. 497, Wickens, V.-C.; *Briscoe* v. *Briscoe*, (1892) 3 Ch. 543.

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Sect. IV.

WHAT PERSONS ARE LIABLE TO HAVE THE CHARGING ORDER MADE AGAINST THEIR PROPERTY.

Persons under disability.

The fact that a person is under disability and, therefore, incapable of employing a solicitor is no objection to the Court's making a charging order against that person's property, if that property has been recovered or preserved through the instrumentality of the solicitor's proceedings in a Court of justice, for the solicitor's right to the order depends, not upon contract, but on *quasi* salvage; accordingly it has been held that the order may be obtained against the property of infants (*a*), married women restrained from anticipation (*b*), *cestuis que trustent* (*c*); and a solicitor of an undischarged bankrupt who has brought an action for personal services can obtain a charging order on the money recovered, not only as against his own client, the bankrupt, but also as against the trustee in bankruptcy who comes forward and claims the money (*d*), unless there are special circumstances which would make this injust (*e*).

Priority of charging order to garnishee order;

The charging order takes priority over every one and everything except a *bonâ fide* purchaser for value without notice, *e.g.*, where a plaintiff has recovered judgment his solicitor is entitled to a charging order in priority to a creditor of the plaintiff who has obtained a garnishee order or a charging order under the Partnership Act, 1890, against the defendant (*f*).

(*a*) *Greer* v. *Young*, (1883) 24 C. D. 545, App.; *Baile* v. *Baile*, (1872) 13 Eq. 497, Wickens, V.-C.

(*b*) *Re Keane, Lumley* v. *Desborough*, (1871) 12 Eq. 115.

(*c*) *Bulley* v. *Bulley*, (1878) 8 C. D. 479, App.

(*d*) *Emden* v. *Carte*, (1881) 19 C. D. 311, App.

(*e*) *Keeson* v. *Luxmore*, (1889) 61 L. T. 199, Prob.

(*f*) *Birchall* v. *Pugin*, (1875) 10 C. P. 397; *Shippey* v. *Grey*, (1880) 42 L. T. 673; *Dallow* v. *Garrold*, (1885) 14 Q. B. D. 543, App.; *Ridd* v. *Thorne*, (1902) 2 Ch. 344, Joyce, J. See also cases on p. 53, *post*.

We have seen that in *Scholey* v. *Peck* (*ante*, p. 20) a charging order was made against a mortgagee and in priority to the mortgage, and in another case an order was made over the property comprised in and in priority to the claims of debenture-holders (*g*).

to mortgage;

In an action for winding up a partnership a charging order may be made in favour of the plaintiff's solicitor, in priority to the debts due to creditors, but the latter must be heard on the application for the order (*h*); as between the partners themselves the Court refused to make a charging order on any shares in the partnership except the share of the solicitor's own client on the ground that under the special circumstances the shares of the other partners had not been recovered or preserved, and even the order charging the client's share was only made by consent (*i*).

to creditors of partnership.

In the Admiralty divison a charging order will be made subject to prior claims where the interests of justice require it; thus, where salvage actions were brought against a foreign ship, it was directed that the claims should rank in the following order of priority: first those of the salvors, secondly the foreign consul's expenses of sending the seamen home, and thirdly the solicitor's charging order. The reason for giving priority to consul's expenses was that the ship was Italian, and by the law of Italy these ranked after the claim for salvage (*ii*).

In Admiralty actions: order of priority.

The solicitor's right to a charging order would probably be held not to prevail against a trustee's right to indemnity out of the fund recovered or preserved, but the order would doubtless be made subject to such right of indemnity. Where an action was brought against two defendants and a building society, in which the plaintiff

Trustee's right of indemnity.

(*g*) *Pelsall Coal and Iron Co.* v. *London and North-Western Ry. Co.*, (1892) 8 Times Rep. 629.

(*h*) *Jackson* v. *Smith*, (1884) 51 L. T. 72.

(*i*) *Rowlands* v. *Williams*, (1885) 53 L. T. 135.

(*ii*) *The* "*Livietta*," (1883) 8 P. D. 209.

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claimed certain money standing in the name of one of the defendants in the books of the society, as in his marital right as husband of the other defendant, judgment having been given for the defendants, their solicitor applied for a charging order. This was opposed by the building society on the ground that they had a lien on the fund for their costs. The Court, however, decided that the society's true position was that, not of trustees but of debtors, and consequently that they had no such lien (*k*).

Sect. V.

FOR WHAT CLAIMS OR DEMANDS A CHARGING ORDER CAN BE MADE.

For costs, charges, and expenses of particular litigation only;

The words of the Act on this point are as follows:—"for the taxed costs, charges and expenses of or in relation to such suit, matter or proceeding; and it shall be lawful for such Court or Judge to make such order . . . for taxation of . . . such costs, charges and expenses." It is not necessary that the costs should have been taxed before applying for the charging order, for the Court has power to direct the taxation in the charging order itself (*l*); but the bill of costs must be taxed at all events unless the client has lost his right to tax it before the fund was recovered, and even if the client has lost the right to tax there seems no reason why the owner of the property recovered or preserved, where such owner is not the client himself, should not require taxation, having regard to the express words of the Act which have just been quoted. At all events the Court would, it is conceived, have power in such a case to order taxation, and it would probably exercise such power, for justice seems to

(*k*) *Porter* v. *West*, (1881) 43 L. T. 569.

(*l*) *Charlton* v. *Charlton*, (1883) 49 L. T. 267, North, J.; *De Bay* v. *Griffin*, (1874) 10 Ch. Ap. 291.

require that the owner, being a third party should not be prejudiced by the *laches* of the client in neglecting to get his solicitor's bill taxed within the proper time. *Res inter alios acta alteri nocere non debet.*

also for costs of application,

The charging order extends not only to the costs of recovering or preserving the property, but also to the costs of the application, and the latter costs as well as the former will be ordered to be taxed as between solicitor and client, following closely the analogy of mortgagee's costs (*m*).

and for costs of establishing retainer,

The charge given by the order will, in addition to the costs of the application, extend to the costs of establishing the solicitor's retainer by the client, where it is necessary to prove such retainer in order to make out that the fund was recovered or preserved (*n*). Of course the retainer must be proved or admitted, even in the case where the charging order is sought against the property of a third person, for both the words of the Act and the leading decisions thereon require that the solicitor should not be a mere volunteer, but *bonâ fide* retained by someone (*o*); and the charge given by the order has been held to extend to the costs, not only of establishing the disputed retainer, but even to the costs of resisting an unsuccessful appeal by the client from the order establishing the retainer (*p*). It will be seen, therefore, that the analogy between the consequences of a charging order and a mortgage is very close and complete. We do not find any decision whether the charging order would also extend to the costs incurred by the solicitor in bringing an action to recover his costs, but there seems no good reason why it should not. The decisions being silent, we can only resort to principle and analogy. Now a mortgage security

and of appeal,

(*m*) *Scholey* v. *Peck*, (1893) 1 Ch. 709, Romer, J.; *Waterland* v. *Serle*. (1897) W. N. 163.

(*n*) *Re Hill*, (1886) 33 C. D. 266, App.

(*o*) *Greer* v. *Young*, (1883) 24 C. D. 545, App.; *Macfarlane* v. *Lister* (1888) 37 C. D. 88, App.

(*p*) *Re Hill*, *ubi supra*.

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and probably of action to recover costs.

always extends to the costs of an action to recover the mortgage debt (*q*), and indeed we can find a much closer analogy in the case of a solicitor's lien on funds where the lien probably extends to the costs of an action to recover the costs in respect of which the lien is claimed (*r*); and, again, in the case of the lien on documents, the lien clearly extends to the costs of an action to recover the costs (*s*).

The charge does not, however, extend to the costs of all collateral proceedings; accordingly, where a solicitor had obtained a charging order on a fund in Court, and a stop order in aid of it, and he appeared on the further consideration of the action in which the fund had been paid into Court, it was held that he must bear his own costs of the stop order and his appearance on the further consideration (*t*).

As to stop order, *quære*.

Costs of litigation only,

It is clear, however, from the language of the Act, that the charging order can only be obtained for costs, charges and expenses relating to proceedings in a Court of justice, and not to other debts, such as money lent or money paid other than professional disbursements such as may be properly included in the taxation of a solicitor's bill of costs (*u*).

may be limited to part only of costs of litigation.

It is, moreover, clearly a special charge to secure only the particular costs incurred in recovering or preserving the property in question, and does not extend to costs in other matters, or to the general balance of account between the solicitor and his client (*x*); indeed, it does not necessarily extend to *all* the costs which the solicitor's own client would be liable for even in the particular

(*q*) *National Provincial Bank* v. *Games*, (1886) 31 C. D. 582, App.

(*r*) *Lucas* v. *Peacock*, (1846) 9 Beav. 177.

(*s*) *Lambert* v. *Buckmaster*, (1824) 2 B. & C. 616; *Gray* v. *Graham*, (1855) 26 L. T. 111 H. L.

(*t*) *Mildmay* v. *Quicke*, (1877) 6 C. D. 553.

(*u*) Cf. *Re Le Brasseur and Oakley*, (1896) 2 Ch. 487, App.; also *Re Hanbury*, (1896) 75 L. T. 449.

(*x*) *Re United Shepherds, &c., Co.*, (1885) W. N. 15.

matter, but only to such part of the costs as relate to the recovery or preservation of the property (*y*), and were properly incurred.

Not for costs of criminal proceedings.

It does not extend to costs of criminal proceedings although they have indirectly caused property to be recovered (*z*). Whether a charging order can be made to secure the costs of proceedings before arbitrators depends upon the mode of the reference. Where this reference was under the Lands Clauses Consolidation Act it was held that a charging order could not be made, as the words of the Act are "suit, matter or proceeding in any *Court of justice*" (*a*). If, however, the submission to arbitration were made a rule of Court or were made by order of *nisi prius*, a charging order would be made (*b*). In the analogous case of a solicitor's lien on funds the lien extends to proceedings before arbitrators (see *post*, p. 78, and the cases there cited).

Not costs of arbitration unless submission by order of Court.

Different rule in case of common law lien.

Sect. VI.

Lapse of Time and the Statutes of Limitation.

When we come to consider the lien on funds and the lien on documents we shall see that the statutes of limitation have no effect on them, for, like the cases of a common artificer's lien or of a mere pledge, the statutes take away only the remedy by action, and do not touch the right of lien or detention.

The same principle would apply to a charging order but for the express words of the Solicitors Act, 1860, s. 28, providing that the statutes of limitation *shall* be a bar to the application. Those words are as follows:— "Provided always that no such order shall be made . . .

Statute of limitations a bar

(*y*) *Scholey* v. *Peck*, (1893) 1 Ch. 709, Romer, J.; *Jackson* v. *Smith*, (1884) 51 L. T. 72, Kay, J.; *Charlton* v. *Charlton*, (1883) 49 L. T. 267, North, J.; *Emden* v. *Carte*, (1881) 19 C. D. 311, App.

(*z*) *Re Humphreys*, (1898) 1 Q. B. 520.

(*a*) *Macfarlane* v. *Lister*, (1888) 37 C. D. 88, App.

(*b*) *Birchall* v. *Pugin*, (1875) L. R. 10 C. P. 397.

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in any case in which the right to recover payment of such costs, charges and expenses, is barred by any statute of limitations."

When statute begins to run.

Notwithstanding the very plain words of this section, there *may* be cases to which they do not apply. For instance, the statute of limitations does not begin to run against the solicitor while the proceedings are going on with that solicitor on the record as the solicitor for the same client (*c*). So, also, where the client has already obtained the common order to tax made upon the usual petition of course, containing the ordinary submission on the part of the client to pay what shall be found due on taxation, and *à fortiori* where the order directs delivery up of papers, the client has been held to have irrevocably waived the benefit of the statute of limitations, and the taxing master must allow statute-barred items as well as those incurred within the period of limitation (*d*). Such cases as these do not violate the words of the Solicitors Act, 1860 s. 28, quoted above, for in such cases the effect of the special circumstances we have mentioned is to *prevent* the right to recover payment being barred by the statute of limitations.

Delay when less than statutory period *not* fatal as a rule.

It has been decided in England that delay will not be prejudicial to the solicitor applying for a charging order if that delay is shorter than the period of limitation, unless the rights of third persons have arisen in the meantime (*e*); but in Ireland it was held that the remedy by charging order was in the discretion of the Court, and that it might exercise its discretion by refusing the order if it considered that the delay has been such that it would be unjust to the party opposing to make an order charging his property (*f*).

(*c*) *Baile* v. *Baile*, (1872) L. R. 13 Eq. 497, Wickens, V.-C.

(*d*) *Re Margetts*, (1896) 2 Ch. 263, Kekewich, J., and cases there cited.

(*e*) *Re Born*, (1900) 2 Ch. 433, Farwell, J.

(*f*) *Roche* v. *Roche*, 29 L. R. Ir. 339. This seems a very unsatisfactory decision, and would possibly not be followed in England.

Appropriation or imputation of payments :

Although the law of the appropriation of payments may not in strictness fall within the range of this work, it may be useful to remind the reader here of the leading cases on the subject in connection with the statutes of limitation.

1. As indicated by debtor.

The law, then, of appropriation or imputation of payments is briefly as follows : Firstly, the money must be applied in discharge of the items indicated by the debtor at the time of payment—*solvitur modo solventis*.

2. As chosen by creditor.

If the debtor has simply paid the money without any indication of his wish, then the creditor can impute the payment to which item he choses—*solvitur modo accipientis*, and he can do this at any time before judgment (*g*).

3. In order of date.

If, however, neither party has at the time indicated the destination of the money paid, then the law, as decided in *Clayton's case* (1813) (*h*), attributes the payment to the debt which is earliest in date, commencing with the liquidation of any interest that may be due. There are certain exceptions to this rule, which, however, need not be considered here. Now applying these rules to the case where the earlier debt is barred by the statute and the later one is not, if the debtor has made no appropriation at the time of payment, the creditor may at any time before judgment attribute the payment to the statute-barred item, and a solicitor has the same rights as any other creditor in this respect (*i*). It must, however, be carefully observed that it is open to him to adopt this latter course only where he has received the payment from the client ; for if he has received the money from a third person, without his

(*g*) *Seymour* v. *Pickett*, (1905) Feb. 25 ; *Smith* v. *Betty*, (1903) 2 K. B. 317.

(*h*) 1 Mer. 572, Sir W. Grant, M.R. ; *Cory* v. *Owners of "Mecca,"* (1897) A. C. 286, H. L. One exception, however, is of some importance to our subject, viz., that the rule in *Clayton's case* does not apply as between a guaranteed account and one *not* guaranteed, *Re Sherry*, (1883) 25 C. D. 692, App.

(*i*) *Philpott* v. *Jones*, 2 A. & E. 41 ; *Seymour* v. *Pickett*, (1905) Feb. 25.

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client's knowledge, he has no right to attribute it to statute-barred items without his client's consent (*k*). Moreover, such appropriation will not revive a debt already barred (*l*).

A creditor is not estopped by entries even in his own books unless he has given the debtor notice of them (*m*).

Continuous action and bill of costs.

Where costs are incurred in one continuous action the statute does not begin to run until the suit is terminated (*mm*). This rule, however, does not apply where the items are for separate matters; in the latter case each item or class of items is with respect to the statute of limitations treated as a separate debt (see, however, p. 105, *post*).

Sect. VII.

other grounds of resistance to charging order.

The words of the Act are:—"It shall be lawful for the Court . . . to declare such . . . solicitor entitled to a charge, . . . and upon such declaration being made, such . . . solicitor shall have a charge," "and all conveyances and acts done to defeat . . . such charge, shall, unless made to a *bonâ fide* purchaser for value without notice, be absolutely void . . . as against such charge."

Court has discretion.

The Courts have always interpreted these words as giving the Court a discretionary power to give or withhold the charging order (*n*).

Charging order is in addition to other remedies.

The remedy is cumulative and does not take away any other remedy that the solicitor may have for obtaining payment of his costs, whether by action, lien on funds or

(*k*) *Waller* v. *Lacey*, 1 Scott, N. R. 186; *Smith* v. *Betty* (1903) 2 K. B. 317.

(*l*) *Mills* v. *Fowkes*, 5 Bing. N. C. 455.

(*m*) *Simpson* v. *Ingham*, 2 B. & C. 65.

(*mm*) *Re Romer* v. *Haslam*, (1893) 2 Q. B. 286.

(*n*) *Pinkerton* v. *Easton*, L. R. 16 Eq. 490, Selborne, C.; *Greer* v. *Young*, (1883) 24 C. D. 545, App.; *Bulley* v. *Bulley*, (1878) 8 C. D. 479, App.

lien on papers, although, of course, if the Court considered that the other remedies afforded such very ample security for the solicitor's protection under the circumstances of the case that a charging order would be wholly unnecessary, it might in the exercise of its discretion refuse to make an order as causing unnecessary expense. Such exceptional cases would, however, be rare (*o*).

In the exercise of its discretion the Court would probably refuse to make an order where it would be useless to the solicitor and ruinous to the client, for example if the making of the order would cause a forfeiture of the owner's interest in the property recovered under a forfeiture clause in a will, or under a power of re-entry in a lease. No case of this kind has yet been decided with respect to a charging order, but in the somewhat analogous case of the discretionary remedy by specific performance the Court has in some cases refused to grant specific performance on the ground of the great hardship that it would under the circumstances occasion to the defendant without any compensating advantage to the plaintiff (*p*).

Priority of notice gives no priority

Where a fund is in the hands of trustees no priority is gained over a solicitor's charging order or lien by giving notice of a subsequent charge to the trustees, as the rule in *Dearle* v. *Hall* (*q*) does not apply to a solicitor's lien or charging order.

It will be seen above that the section of the Act expressly saves the right of a *bonâ fide* purchaser without notice, but that does not mean that the notice must be express; on the contrary, it has been

(*o*) *Groom* v. *Cheesewright*, (1895) 1 Ch. 730, Kekewich, J.; *Re Wadsworth, Rhodes* v. *Sugden*, (1885) 29 C. D. 517; (1887) 34 C. D. 155.

(*p*) *Faine* v. *Browne*, 2 Ves. 307; *Peacock* v. *Penson*, 11 Beav. 355; also other cases cited in Fry on Specific Performance on this point.

(*q*) 3 Russ. 1; *West of England Bank* v. *Batchelor*, (1882) 46 L. T. 132, Fry, J.; *Lord* v. *Colvin*, (1862) 2 Dr. & Sm. 82; *Day* v. *Day*, (1857) 26 L. J. Ch. 585, L.JJ.

held that where a person took an assignment of a judgment, and knew that the solicitor had been employed, he must be taken to have had notice of the solicitor's right to a lien, and, therefore, was not "a purchaser for value without notice" (*r*), and that the solicitor was entitled to a charging order. It is now the received doctrine that all persons dealing with a fund obtained by litigation must be taken to be aware that it is subject to the deduction of the costs to be paid to the solicitor who has conducted the litigation which has been successful, and that it is always right to make the order in favour of the solicitor unless he has been guilty of some *mala fides* and has "stood by" while the fund was being dealt with so as unfairly to prejudice the position of others (*s*).

Who is a purchaser without notice.

Notice readily imputed.

The Court does not of course encourage the expense of useless charging orders, and where the solicitor applying had already taken an express written mortgage upon the property recovered or preserved, the Court refused to make a charging order (*t*).

We have seen that the charging order is for the benefit of the solicitor, and not for the purpose of giving a client a charge over another person's property (see *ante*, p. 23).

Mere appointment of new trustees is not "recovery or preservation."

The mere appointment of new trustees does not as a rule amount to recovery or preservation of the trust property (*u*). We have seen that in *Greer* v. *Young* the Court of Appeal declined to so treat it under the special circumstances of the case on the ground that the decree appointing the new trustees only provided the hand to

(*r*) *Cole* v. *Eley*, (1894) 2 Q. B. 180, 350, App.

(*s*) *Dallow* v. *Garrold*, (1885) 14 Q. B. D. 543, App.; *Faithfull* v. *Ewen*, (1877) 7 C. D. 495, App.; *Cole* v. *Eley*, *supra*; *McLarnon* v. *Carrickon-Fergus U. D. C.*, (1904) 2 I. R. 44. *Macfarlane* v. *Lister*, (1888) 37 C. D. 88, App., was a case where the solicitor was held to be estopped by his conduct from obtaining a charging order.

(*t*) *Groom* v. *Cheesewright*, (1895) 1 Ch. 730, Kekewich, J.

(*u*) *Greer* v. *Young*, (1883) 24 C. D. 545, App.; *Re Viney's Trusts*, (1868) 18 L. T. N. S. 851, Giffard, V.-C.

receive the dividends which constituted the property recovered in that case.

As to set-off of judgments after charging order obtained on one of them the Court has a discretion (*x*).

Estoppel by conduct.

Of course the solicitor may be estopped by his conduct from applying for the charging order. Thus, where the solicitors undertook to hold the money according to a direction contained in a letter from the plaintiff, they lost their priority (*y*). The mere knowledge and approval, however, of the solicitor of the client's mortgaging his interest in an estate, the subject of an action, will not prevent the solicitor from obtaining a charging order, and this charge will take priority over the mortgage (*z*). The mere fact that a solicitor has acted both for mortgagee and mortgagor does not prevent the charge arising, for it is given by law (*a*).

The fact that a solicitor has discharged himself from acting as the plaintiff's solicitor is no defence to an application for a charging order provided he has had reasonable grounds for retiring from the case, nor is the fact that the action is still pending any objection to the making of the order, nor the fact that the money is still in Court, nor does the circumstance that it is in Court instead of in the plaintiff's pocket prevent its being recovered within the meaning of the Act and liable to be charged accordingly (*b*).

What is recovery?

Taxed costs

It is no objection to the application for the charging order that the costs have not yet been taxed, for the charge will be given for costs taxed and to be taxed (*c*).

(*x*) *Goodfellow* v. *Gray*, (1899) 2 Q. B. 498, App.
(*y*) *Macfarlane* v. *Lister*, (1888) 37 C. D. 88, App.
(*z*) *Faithfull* v. *Ewen*, (1877) 7 C. D. 495, App. ; *Cole* v. *Eley*, (1894) 2 Q. B. 180, 350, App.
(*a*) *Macfarlane* v. *Lister*, *supra*.
(*b*) *Clover* v. *Adams*, (1880) 6 Q. B. D. 622.
(*c*) *Charlton* v. *Charlton*, (1883) 49 L. T. 267, North, J.

Sect. VIII.

JURISDICTION AND PROCEDURE TO OBTAIN AND ENFORCE CHARGING ORDER.

To ascertain which Court has jurisdiction to make the order we must refer to the words of the Act, which are as follows: "It shall be lawful for the Court or Judge before whom any such suit, matter, or proceeding has been heard or shall be depending, to declare such . . . solicitor entitled to a charge upon the property recovered or preserved, . . . and it shall be lawful for such Court or Judge to make such order or orders for taxation of and for raising and payment of such costs, charges, and expenses out of the said property as to such Court or Judge shall appear just and proper."

What Court has jurisdiction?

We will deal first with the question, what Court or Judge has jurisdiction to make the charging order, and then see what is the appropriate procedure for obtaining and carrying it into effect.

Same Court as original action was tried in.

The tribunal entrusted by the Act with the jurisdiction is the Court or Judge before whom the proceedings took place which resulted in the recovery or preservation of the property against which the charging order is sought but if the recovery or preservation was in the Court of Appeal the application for the charging order should be made to the Court of first instance (*d*). If it was recovered or preserved in the Chancery Division the application for the order should be made to the Judge to whose Court the cause or matter was attached (*e*), but it is not essential that he should hear the application in person if it is made by summons in chambers, for the master represents the judge in chambers subject to the right of every litigant to have the summons adjourned

Chancery Division.

Master.

(*d*) *Higgs* v. *Schrader*, (1877) 3 C. P. D. 252; *Re Deakin*, (1900) 2 Q. B. 489, App.

(*e*) *Heinrich* v. *Sutton, re Fiddey*, (1871) 6 Ch. 865, App.; but see *Owen* v. *Henshaw*, (1877) 7 C. D. 385, where the action was in the district registry.

to the judge personally at any stage of the summons (*f*); but if the application is made by petition it is of course heard in open court by the Judge himself. The words of the Act just quoted do not, moreover, prevent the application being heard by the Judge's successor in case of death, retirement, or promotion to the Court of Appeal.

Judge's successor.

In the King's Bench Division a different rule prevails, and it has been held that any Judge of the King's Bench Division has jurisdiction to make a charging order at chambers, whether he was the Judge who tried the action or not, so long as the action in which the property was recovered or preserved was a King's Bench action (*g*). It has not been expressly decided that a master in chambers or a district registrar has power to make a charging order, but it is submitted that he clearly can having regard to the words of Orders LIV. r. 12 and XXXV. r. 6 (*h*), subject to this limitation in the case of a district registrar, that the action in which the property was recovered or preserved was pending in his own registry at the time of the recovery or preservation of the property.

King's Bench Division.

Any Judge, master, district registrar.

Probably a registrar in bankruptcy has jurisdiction to make a charging order on property recovered in his court (*i*), and there seems no reason to doubt that a county court Judge, or the Judge of the Mayor's Court, London, or any other local Courts, would have the same jurisdiction to make a charging order where property was recovered or preserved by proceedings in their respective Courts, the words of the section being as wide as possible, "*in any Court of justice*" (see full text of section, p. 8). We have seen an instance of such an order being made in the Probate Division (p. 14, *ante*), and the Judges trying cases under the

Bankruptcy registrar.

County court. Mayor's Court.

(*f*) *Scott* v. *Homer*, (1891) 63 L. T. 618, Kekewich, J.
(*g*) *Clover* v. *Adams*, (1881) 6 Q. B. D. 622.
(*h*) *Townend* v. *Kirkham*, (1898) 1 Q. B. 51.
(*i*) *Exp. Fanshawe, re Wood*, (1897) 1 Q. B. 314; but see *Re Deakin*, (1900) 2 Q. B. 489, App.

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Railway and Canal Commission Acts have power to make the order (*j*).

It will be seen when we deal with the question of procedure that a summons for a charging order should not be a summons originating proceedings, but an ordinary summons entitled in the same action as that in which the property was recovered, and that it should *not* be entitled in the matter of the Act or the solicitor (*k*). All these details exemplify and illustrate what we have just said as to which Court has jurisdiction to make the order.

Arbitration.

Where the property has been recovered or preserved by proceedings under the Lands Clauses Consolidation Act, the order cannot be made because the arbitrators are not a Court of justice, and there is no Court of justice which, by the terms of the Solicitors Act, has jurisdiction to make the charging order (*l*). And as a submission to arbitration can no longer be made a rule of Court, that Court has no seisin of the matter, and consequently has no power to make a charging order in any arbitration, but, as we shall see on p. 78, a solicitor has the lien on funds recovered under an arbitration just like his lien on a judgment, so that the distinction is really more academic than practical in most cases.

We will now deal with procedure.

Delivery of bill not necessary beforehand.

In the first place, the provision of the Solicitors Act, 1843, s. 37, that a solicitor must deliver his bill of costs a month before bringing an action to recover the amount, has no application to a summons or petition for a charging order, so that it is quite unnecessary, and often undesirable, to delay the application for the order until the bill has been delivered or even made out and copied,

(*j*) *Pelsall Coal Co.* v. *London and North-Western Railway*, (1893) 8 Times R. 629.

(*k*) *Hamer* v. *Giles*, (1879) 11 C. D. 942, Jessel, M.R.; *Brown* v. *Trotman*, (1879) 12 C. D. 880, Fry, J.

(*l*) *Macfarlane* v. *Lister*, (1888) 37 C. D. 88, App.

for, as we have seen on p. 26, the Court can by the order itself direct that the costs shall be taxed, and the fact that the bill has not been made out or taxed is no obstacle or defence whatever to the application.

Procedure in Chancery Division, petition or summons.

The usual mode of making the application is in the Chancery Division by petition, but a summons in chambers will do as well (*m*), and where the amount of the costs is small the Court might possibly direct the taxing master to allow no more costs of the application than if it had been made by summons instead of petition, although in one case the Court refused to do this (*n*).

Costs as between solicitor and client.

The Court gives the costs of the application as between solicitor and client, by analogy to costs given to a mortgagee, but these are not usually directed to be paid by the client or other owner of the property recovered or preserved, but are added to the debt for which the charging order is made (*o*). An affidavit is made in support of the petition or summons, and it then comes on in the usual way. In case of urgency an order *nisi* can be obtained *ex parte* (*oo*). (For forms of all these proceedings, see Appendix I.)

King's Bench Division.

In the King's Bench Division there is no such proceeding as a petition, but the application is made by summons in chambers, or in case of urgency *ex parte*; and if either party is dissatisfied with the decision he cannot now appeal from the Judge to the Court of Appeal without obtaining the leave either of the Judge or of the Court of Appeal (*p*).

Summons or *ex parte*.

If the summons cannot be served personally an order for substituted service can be obtained (*q*).

(*m*) *Scholey* v. *Peck*, (1893) 1 Ch. 709 ; *Hamer* v. *Giles*, (1879) 11 C. D. 942 ; *Brown* v. *Trotman*, (1879) 12 C. D. 880.

(*n*) *Brown* v. *Trotman*, *ubi supra*.

(*o*) *Scholey* v. *Peck*, *ubi supra* ; *Waterland* v. *Serle*, (1897) W. N. 163 ; *Re Murnaghan*, (1903) 2 Ir. R. 287.

(*oo*) *Re John Clayton Limited*, (1905) 92 L. T. 223.

(*p*) Judicature Act, 1894, s. 1.

(*q*) *Hunt* v. *Austin*, *exp. Mason*, (1882) 9 Q. B. D. 598.

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In bankruptcy the charging order is obtained by motion either *ex parte* or on notice (*r*).

Neither a petition nor a summons should bear any title except the title or heading of the action in which the recovery took place (*s*), and the summons should be an ordinary summons and not an originating one, for the application is treated as a continuation of the former proceedings and not as a fresh litigation. Neither summons nor petition should be headed in the matter of the solicitor.

Stop orders, injunction, etc.

The court has power to make not only the charging order, but to give such other ancillary relief as it thinks fit by stop order on a fund in Court, injunction to restrain receipt or payment of money to persons other than the solicitor, appointment of a receiver of rents, or otherwise (*t*). It may also direct the taxation of costs or order accounts or inquiries, as it thinks just or proper (*u*), and ultimately a sale of the property.

Taxation.

County and other Courts.

In Courts and divisions other than the Chancery and King's Bench Divisions the application for a charging order is usually made by motion according to the practice of the Court in question on interlocutory applications. As to the county court the charging order is usually made at the trial, or if later on, the application is made as indicated by Order XII. r. 11, County Court Rules.

Forms in Appendix.

Forms of summonses, petitions, affidavits, orders, and costs for taxation will be found at the end of this work.

Where a stop order is obtained in aid of a charging order as mentioned above it should be lodged at once with the Paymaster-General to prevent the risk of a later

(*r*) *Clover* v. *Adams*, 6 Q. B. D. 622 ; *Re Burton*, (1903) 1 Ir. R. 127 ; *Re Deakin*, (1900) 2 Q. B. 489.

(*s*) *Hamer* v. *Giles*, (1879) 11 C. D. 942.

(*t*) *Smith* v. *Winter*, (1870) 18 W. R. 447, James, V.-C., and see cases cited on p. 76, *post*, as to stop orders in aid of the lien on funds ; also *Gerrard* v. *Dawes*, (1869) 18 W. R. 33.

(*u*) *Charlton* v. *Charlton*, (1883) 49 L. T. 267, North, J.

charge gaining priority, as priority of charge on a fund in court is determined by priority of stop order (*x*).

Stop order.

A stop or restraining order can be made, not only on a fund in Court but on title-deeds, share certificates, or other property deposited with the Paymaster-General for safe custody. It does not determine any question as to the rights of the parties like a charging order does, but merely prevents any order for payment or delivery out of Court without notice to the party lodging the stop order (*y*).

Registration as *lis pendens*.

When the charging order is made against real estate, whether freehold, leasehold, or copyhold, it is prudent to register it or the action in which it is made as a *lis pendens*, but the registration of a *lis pendens* has no effect on personal property other than chattel interests in land (*z*).

Proof in bankruptcy or other proceedings.

Where a solicitor who has obtained a charging order proves his debt in bankruptcy or winding-up proceedings or files a bankruptcy petition, he will risk losing the benefit of his charging order unless he sets a value upon it and deducts such value from his claim. (See *post*, p. 104, and forms of proof in Appendix I.)

(*x*) *Mack* v. *Postle*, (1894) 2 Ch. 449, Stirling, J.
(*y*) Annual Practice, 1905, p. 654 *et seq.*
(*z*) *Wigram* v. *Buckle* , (1894) 3 Ch. 483, App.

CHAPTER II.

Sect. I.

NATURE OF LIEN ON FUNDS.

As before mentioned, this lien is quite independent of the 28th section of the Solicitors Act; and although it bears a strong resemblance to the charging order created by that section, yet it must be carefully distinguished from it. As we have in the former part of this work mentioned the principal differences between the lien and the charging order (see p. 9), we shall not repeat them here. It should however be observed that the lien on funds is still of considerable practical importance, notwithstanding the power to get a charging order, first, because, the power of the Court to give a charging order is discretionary, and not a matter of right; secondly in some cases where a charging order will not be made the solicitor has a lien; and, thirdly, in some cases where a solicitor has not a lien he can obtain a charging order.

Definition.

This lien on funds has been defined as "a claim to the equitable interference of the Court to have the judgment held as a security for the solicitor's costs" (*a*) and it is said in a passage in Chitty's Archbold, quoted by a learned Judge in a modern leading case on this branch of the law, "The Court will exercise this equitable interference where the solicitor has given the opposite party or his solicitor notice of his lien, and that he claims the amount payable to his client to be paid to him in the first instance, in which case the opposite party will at

(*a*) *Barker* v. *St. Quintin*, (1844) 12 M. & W. 441.

his peril pay the client or release the claim, or compromise it without the assent of the solicitor. So the Court will exercise it, though no such notice has been given, in cases where it is clearly made out that there is some collusion or fraudulent conspiracy between the parties to cheat the solicitor out of his costs, but unless such notice has been given, or there has been such collusion or fraudulent conspiracy, the client, though he sues *in formâ pauperis*, may compromise with the other party and give him a release without the intervention of his solicitor, and the solicitor in such a case can look to his client only for payment, and cannot proceed in the action. Even after such notice the parties may, it seems, compromise before verdict or judgment without regard to the solicitor's claim for costs." This last sentence, as we shall see (*b*), does not mean that the other party can pay the money to the client direct without regard to the solicitor's costs; it merely means that the compromise would be valid and could not be upset by the solicitor, but the other party would be bound to see that the amount of the solicitor's lien was satisfied before he paid any money to the client under the compromise. If the solicitor cannot prevent a compromise he can insist upon receiving the fruits of it to the extent of his unpaid costs.

Collusion or notice essential.

The lien on funds that we are treating of in this part of the work is the particular or special lien on the fruits of an action or other proceeding in which a solicitor is professionally engaged, these fruits being the debt, damages, fund in Court, or other monies recovered in such action or other proceeding, including the costs recovered.

Lien on funds is special.

In addition to this particular or special lien, which extends to his costs in the particular action or proceeding only, a solicitor has a general lien available for his costs

(*b*) *Ross* v. *Buxton*, (1889) 42 C. D. 190, Stirling, J.; *Slater* v. *Mayor of Sunderland*, (1864) 33 L. J. Q. B. 37.

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General lien on funds.

in all matters on any monies of his clients coming into his possession, unless paid to him by the client for a specific purpose; and this lien may be asserted even against the client's trustee in bankruptcy (*c*). This general lien, however, is merely passive, and practically amounts to a mere right of set-off by the solicitor of the amount of his general costs against his client's monies in his hands (*d*), so it is very different in its nature and consequences from the special lien on funds which is dealt with in the following pages.

Sect. II.

What property is subject to the lien on funds.

The solicitor's lien attaches on whatever is coming to a client at the close of the proceedings in which he has employed the solicitor professionally. The principle upon which the lien is founded is, that the client should not run away with the fruits of the cause without satisfying the claim of his solicitor, by whose industry, and in many cases at whose expense, those fruits were obtained.

This lien applies, not only to hostile actions, but to friendly proceedings as well, *e.g.* administration, partition, partnership, and other actions (*e*).

In the Chancery Division a solicitor has a lien on a

(*c*) *Welsh* v. *Hole*, 1 Doug. 238; *Miller* v. *Atlee*, (1849) 3 Ex. 799; *Exp. Bowden*, 2 Deac. & C. 182; *Hanson* v. *Reece*, (1857) 3 Jur. N. S. 1204; *Re Phœnix Life*, (1863) 1 H. & M. 433; *Exp. White*, (1841) 2 M. D. & De G. 436.

(*d*) *Mackenzie* v. *Macintosh*, (1891) 64 L. T. 706, App.

(*e*) *Read* v. *Dupper*, (1795) 6 T. R. 361, Kenyon, C.J.; 3 Rev. Rep. 200; *Skinner* v. *Sweet*, 3 Madd. 244; *Ross* v. *Buxton*, (1889) 42 C. D. 190, Stirling, J.

fund realised, recovered, or protected by his industry; and although the order may be personal and direct payment of the costs to the client, that circumstance does not deprive the solicitor of his lien; on the contrary, the Court will if necessary give effect to the lien by varying the order by directing payment to the solicitor instead of the client (*f*). In the Chancery Division it is the practice except under very special circumstances to direct payment to the solicitor where the costs are payable out of a fund in Court, but in other cases the costs are directed to be paid to the parties themselves (*g*). In the former case if the solicitor practises in the country the costs are paid out of Court to the town agent on the record. The Court protects the just rights of its own officers, even to the extent of directing the costs of prior solicitors to be taxed and paid by the persons to whom the residuary estate had been paid over where such costs had been omitted to be provided for in the order directing taxation and payment of the costs of all parties (*h*).

In Chancery Division.

A petitioning creditor's costs of obtaining a receiving order in bankruptcy are a charge upon the assets in the order of priority prescribed by the rules made under the Bankruptcy Acts (r. 125), and his solicitor has a lien on these like he has on the amount recovered by him for a judgment creditor in an action. Where the petition is dismissed with costs the debtor's solicitor has a lien upon these costs, and by giving notice of such lien to the petitioning creditor he can require them to be paid to him direct instead of the debtor (*hh*).

In bankruptcy.

A solicitor of a creditor who has proved his client's debt in bankruptcy, or in the winding up of a company, or in the

Lien on dividend in bankruptcy, etc.

(*f*) *Exp. Bryant*, (1815) 1 Madd. 49; 2 Ro. 237, Plumer, M.R.

(*g*) But if the client becomes bankrupt the order will direct payment to the trustee unless the solicitor applies for a charging order: *Baker* v. *Abbott*, (1897) W. N. 38.

(*h*) *Armstrong* v. *Storer*, (1859) 27 Beav. 471.

(*hh*) *Re Deakin*, (1900) 2 Q. B. 489, App.

administration of a deceased person's estate by the Court has a lien upon the dividends, or can obtain an order under the Solicitors Act charging them with the payment of the costs of proof, and he would also be entitled to a stop order on the fund in Court (*i*), but the order will not charge the dividend with the costs of a judgment (*k*).

The taxation of a solicitor's bill under the Solicitors' Act gives the solicitor for the client taxing it a lien upon the amount disallowed, and which would be refunded to the client who had overpaid the solicitor whose bill is taxed (*l*).

In lunacy cases.

By the Lunacy Act, 1890, s. 109, it is provided that the costs of all proceedings for the purpose of ascertaining whether a person is a lunatic and of all proceedings in the matter of a lunatic shall be in the discretion of the Judge in Lunacy, who may order all or any of such costs to be paid by the lunatic or alleged lunatic or to be charged upon and paid out of his estate, or such part thereof as the Judge thinks fit, or by any other party to the proceedings; and in the case of the death of the lunatic or alleged lunatic an order for payment of costs out of his estate may be made within six years next after the right to recover the costs has accrued, and every such order has the effect of an order of the High Court.

This enactment is now substituted for the 29th section of the Solicitors Act, 1860, which section was repealed by the Lunacy Act, 1890.

Although the costs are in the discretion of the Judges in Lunacy, that is the Lords Justices sitting in Lunacy, an appeal lies to the Court of Appeal from their order as to the payment of the costs of an inquiry into the mental

(*i*) *Re Born*, (1900) 2 Ch. 433, Farwell; *Re National Assurance Co., re Cross*, (1871) L. R. 7 Ch. 221.

(*k*) *Re Cook, exp. Cripps*, (1899) 1 Q. B. 863.

(*l*) *Re Margetson and Jones*, (1897) 2 Ch. 314, Kekewich, J.; *Re Hill*, (1886) 33 C. D. 266, App.

condition of an alleged lunatic (*m*). Where the alleged lunatic has been found to be of sound mind sect. 109 of the Lunacy Act, 1890, gives complete jurisdiction to award costs in accordance with what may appear right to the Judge in Lunacy (*n*). If the demand for the inquiry is really prompted by a desire to protect the person and property of the alleged lunatic, and is presented on reasonable grounds and in a reasonable manner, the expenses of such a proceeding ought not to fall on the person so invoking the aid of the law to protect those in need of protection. Where the Judge in Lunacy has made an order charging costs on a fund consisting of Consols belonging to the alleged lunatic and directing him to transfer so much of the Consols as will suffice to pay the amount of the taxed costs, and the alleged lunatic has refused to make the transfer, the Judge has power to order the official solicitor of the Court or any other person to make the transfer (*o*).

After the death of a lunatic the Court will not make an order as to costs in the absence of the legal personal representative (*p*).

It has been decided upon the interpretation of the repealed section 29 of the Solicitors Act, 1860, that the order for payment as well as the order for taxation must be made within the six years after the time when the right to recover has accrued (*q*). It is doubtful on the decisions whether this time is the death of the lunatic (at the latest) or the date when the Court declared the costs to have been properly incurred (*r*).

No lien on real estate.

Until the well-known case of *Shaw* v. *Neale* (*rr*) in the

(*m*) *Re Cathcart*, (1892) 1 Ch. 549 and (1893) 1 Ch. 466, App.

(*n*) *Re Cathcart*, *ibid.*

(*o*) *Re Cathcart*, *ibid.*

(*p*) *Re Popham*, (1881) 44 L. T. 323, L.JJ.

(*q*) *Re Cumming*, (1860) 2 De G. F. & J. 376, L.JJ.

(*r*) *Re Cumming*, *ibid.* ; *Wilkinson* v. *Wilkinson*, (1851) 22 L. J. Ch. 155 ; *Stedman* v. *Hart*, (1854) 23 L. J. Chy. 908, Wood, V.-C. ; *Exp. Turner*, (1861) 30 L. J. Chy. 29.

(*rr*) 6 H. L. Ca. 581.

Chap. II. Sect. II.

House of Lords it was a matter of controversy, ever since Lord Hardwicke's time, whether a solicitor's lien could be asserted against real property recovered or preserved for the client. That decision set the question at rest by deciding that no such lien existed in the case of real estate. This illiberal doctrine however led to the passing of the Solicitors Act, 1860, which (by sect. 28) gave the Court power to make a charging order on all kinds of property, real as well as personal, so that for all practical purposes the decision of the House of Lords has been abrogated by the Act of Parliament, the exceptional cases where the Court has no power to make a charging order even if it would desire to do so being such as rarely happen (*s*). It has been decided in Ireland (*t*) that a solicitor has no lien on chattels recovered, but a charging order can be made on them under the 28th section of the Solicitors Act, 1860 (*u*).

Nor on money paid for specific purpose.

A solicitor has no lien on money paid to him for a specific purpose, even where that purpose has failed or cannot be carried out unless the client permits him to retain it either expressly or tacitly (*x*).

Nor on trust estate administered out of Court.

A solicitor has no lien upon trust property not being administered by the Court for his costs of such administration. This doctrine rests upon considerations of the great inconvenience that would result from holding that not only the solicitor, but every other person employed by the trustees, such as architects, surveyors, and the like, might come for an account of the administration (*y*). A similar principle has been applied to other

(*s*) One instance, however, is the case of an easement. See *ante*, p. 12.

(*t*) *Savage* v. *James*, 9 Ir. Eq. 352.

(*u*) *Briscoe* v. *Briscoe*, (1892) 3 Ch. 543, Kekewich, J.

(*x*) *Re Mid Kent Fruit Factory*, (1896) 1 Ch. 567, Williams, J.; *Stumore* v. *Campbell*, (1892) 1 Q. B. 314, App.; *Brandao* v. *Barnett*, 12 Cl. & F. 787 and 806, H. L.

(*y*) *Worrall* v. *Harford*, 8 Ves. 4, Eldon, C.; *Hall* v. *Laver*, 1 Ha. 571, Wigram, V.-C.

cases, *e.g.*, claims by solicitors for promoting Railway Acts (*z*). It has however been held that where a trust deed of assignment for the benefit of creditors contains, amongst other trusts, a trust to pay the costs of preparing it, the solicitor who prepared it is entitled to set off his costs against monies received by him on account of the trustees although he did not prepare the deed upon their retainer (*a*). In the winding up of companies by the Court a different rule prevails, and neither the solicitor for the official liquidator nor the official liquidator himself can retain any of the funds of the company without an express order. The same rule applies to receivers and their solicitors (*b*).

Nor in winding up of companies by the Court.

Nor by receivers, etc.

As to a wife's alimony in divorce proceedings, her solicitor has no lien upon it unless she has expressly authorised him to receive it under r. 94 (*c*), but he has a lien on the fund paid into Court as a security for the wife's costs, and this lien will not be interfered with to pay the husband's costs of the wife's unsuccessful appeal provided her solicitor did not act vexatiously or oppressively in conducting it (*d*).

Wife's alimony.

Security for wife's costs.

By the Workmen's Compensation Act, 1897, Schedule II. (12) a solicitor's lien is practically limited to the party and party costs.

Where the fund subject to the lien is in Court the solicitor can obtain a stop or restraining order in aid of his lien; and also, it is apprehended, a charging order

Stop or restraining order.

(*z*) *McGregor* v. *Derbyshire Railway*, 13 L. T. 445; *Wyatt* v. *Metropolitan Board of Works*, (1863) 11 C. B. N. S. 744.

(*a*) *Re Sadd*, (1865) 34 L. J. Chan. 562.

(*b*) *Union Cement Co.*, (1872) 26 L. T. 241; *Wickens* v. *Townsend*, 1 Russ. & M. 361.

(*c*) *Leete* v. *Leete*, (1879) 40 L. T. 788, P. D.; *Cross* v. *Cross*, (1881) 43 L. T. 533, P. D.; *Bremner* v. *Bremner*, L. R. 1 P. & M. 257, distinguished. See *Harrison* v. *Harrison*, (1889) 13 P. D. 180, App.

(*d*) *Hall* v. *Hall*, (1891) P. 302; *Parry* v. *Parry*, 30 Sol. Jo. 386.

even where the right to the lien is, in the opinion of the Court, doubtful (*e*).

A lien is assignable and a receiver of it can be appointed (*ee*).

Sect. III.

THE PERSONS ENTITLED TO THE BENEFIT OF THE LIEN ON FUNDS.

The solicitor for any party, whether plaintiff, defendant, or other party, to any action or other proceeding, is entitled to this lien if the fund recovered, including costs, be such as is properly subject to a solicitor's lien, as mentioned in the preceding chapter (*f*).

Lien is independent of retainer.

The right to assert a lien is independent of the question of retainer so long as the person against whom the lien is claimed has had the benefit of the solicitor's services and expenditure (*g*), and in some cases even if the client turns out to have no interest in the fund (*h*).

Representatives of deceased solicitor.

On the death or bankruptcy of the solicitor the relationship of solicitor and client is of course severed; and if a fund be afterwards realised in consequence of the services of the deceased or bankrupt solicitor in an action or other proceeding commenced in his lifetime or before his bankruptcy, his personal representatives or trustee in bankruptcy are entitled to a lien on such fund for the costs of the proceedings earned by the deceased or bankrupt at the time of his death or bankruptcy (*i*). If

(*e*) *Verity* v. *Wylde*, (1859) 4 Drew. 427, Kindersley, V.-C.; *Hobson* v. *Sherwood*, 8 Beav. 486, Langdale, M.R.; *Bozon* v. *Bolland*, (1839) 4 My. & C. 354, Cottenham, C.; *Smith* v. *Winter*, (1869) 18 W. R. 447, James, L.J.

(*ee*) *Westhead* v. *Riley*, (1883) 25 C. D. 413.

(*f*) *Doe* d. *Swinton* v. *Sinclair*, 5 Dowl. P. C. 26; *Young* v. *Redhead*, 2 Dowl. P. C. 119; *Pounset* v. *Humphreys*, 1 C. P. Coop. 142, Cottenham, C.; *Bawtree* v. *Watson*, 2 Kee. 713, Langdale, M.R.

(*g*) *Hall* v. *Laver*, 4 Y. & C. 216; 1 Ha. 571, Alderson, B.

(*h*) *Best* v. *Stonehewer*, (1867) 15 W. R. 419.

(*i*) *Kellett* v. *Kelly*, (1842) 5 Ir. Eq. 34; *Bozon* v. *Bolland*, (1839) 4 My. & Cr. 354, Cottenham, C.

the client has arbitrarily discharged the solicitor (*k*), the right of the solicitor to his lien still holds good.

Assignment for benefit of creditors.

A solicitor to a trustee of a deed of assignment for the benefit of creditors stands in no better position than his client, the trustee, as regards his claim for costs out of the assets; so where such a deed was held to be an act of bankruptcy, and an adjudication had been made founded thereon, it was held that the trustee under such deed was not entitled to deduct from any assets realised by him the costs of his solicitor incurred in connection with the deed (*l*). Moreover, he may be estopped by his conduct from setting up a lien. For instance, where a solicitor to a compounding debtor received sufficient money to pay the composition, and sent out a circular to the creditors stating that he would be prepared to pay it on a specified day, it was held that he had constituted himself a trustee for the creditors, and could not set up his lien for unpaid costs as a defence (*m*).

Winding up of companies.

In the winding up of a company, the costs of a petitioner are a first charge before even the costs of the official liquidator; and where the official liquidator changes his solicitors, the successive solicitors are entitled to the fund rateably, unless a special arrangement has been made to the contrary (*n*). This is different from the rule prevailing in the case of a charging order, where there is a competition for priority between successive solicitors (see p. 23, *ante*), and from the case of a lien on funds under similar circumstances, in both of which cases the last solicitor in the order of date is entitled to priority of lien.

In the winding up of a company, neither the official liquidator nor his solicitor has any right to retain any

(*k*) *Clover* v. *Adams*, (1881) 6 Q. B. D. 622, Lindley, J., and others.

(*l*) *Re Forster, exp. Rawlings*, (1888) 58 L. T. 114; 4 Mor. 292, Cave, J. See also cases on p. 111, *post*.

(*m*) *Exp. Newland, re Clark*, (1876) 4 C. D. 515, Bacon, C., Judge.

(*n*) *Re Audley Hall Cotton-spinning Co.*, (1868) 6 Eq. 245.

Chap. II. Sect. III.

Priorities between solicitor, liquidator, and others.

part of the company's assets without an order of the Court, notwithstanding any right of lien (*o*). An official liquidator is not entitled to payment of his remuneration till all the costs of winding up, including his own solicitor's costs, have been paid in full (*p*) ; but the official liquidator is entitled to his expenses out of pocket rateably with his solicitor's claim for costs ; and the costs of an alleged contributory whose costs are directed to be paid by the official liquidator, and retained by him out of the assets of the company, are payable in priority to the costs of the solicitor to the official liquidator (*q*). Where the voluntary winding up of a company has been continued under the supervision of the Court, and the assets are not sufficient to pay the costs both of the liquidator and of the creditor on whose petition the supervision order was made in full, the costs are payable in the following order : first, the costs of the liquidator incurred prior to the date of the supervision order ; secondly, the petitioner's costs of obtaining the order ; thirdly, the liquidator's subsequent costs (*r*).

Sect. IV.

THE PERSONS AGAINST WHOM THE LIEN ON FUNDS CAN BE ASSERTED.

Available against executors, assigns, mortgagees, etc.

Speaking generally, the lien can be asserted against the client and persons claiming through him, *e.g.*, his executors, administrators, assigns, whether special, such as mortgagees, purchasers, and the like, or general assigns, such as trustees in bankruptcy, committees in lunacy, and other persons who stand in the client's

(*o*) *Union Cement and Brick Co.*, (1872) 26 L. T. 241, Wickens.
(*p*) *Re Massey*, (1873) L. R. 9 Eq. 367.
(*q*) *Dominion of Canada Plumbago Co.*, (1884) 27 C. D. 33, App.
(*r*) *New York Exchange Co.*, (1893) 1 Ch. 371, Kekewich, J.

place (*s*). So also in the administration of the assets of a deceased person by the Court the solicitor's lien is treated as an incumbrance entitled to priority over the general creditors (*t*). Likewise where a receiver has been appointed in an action instituted on behalf of debenture-holders of a company the solicitor's lien on assets recovered by him takes priority over the title of the receiver to such assets (*u*). The lien of a judgment creditor's solicitor on the amount of a judgment recovered by his exertions takes priority over a garnishee order obtained by a creditor of that judgment creditor, for a garnishee order only operates upon the debt attached after satisfying all prior incumbrances on the debt attached, including the solicitor's lien upon it (*x*). It is conceived that the solicitor's lien would have priority over a charging order obtained under the Partnership Act, 1890, s. 23. The lien takes priority over a judgment creditor's charging order made under 1 & 2 Vict. c. 110 (*y*).

Receiver.

Garnishee order.

Lien takes priority over charging orders under Partnership Act, 1890, and charging orders for judgment debts.

In the old days of attainder for felony, it was considered doubtful whether the entire proceeds of a judgment would vest in the Crown on the attainder, or whether the Crown would only have been entitled to the balance after deducting the amount of the attorney's lien, but since

(*s*) *Pounset* v. *Humphreys*, 1 C. P. Coop. 142, Cottenham, C. ; *Jones* v. *Turnbull*, 2 M. & W. 601 ; *Exp. Moule*, (1821) 5 Madd. 465, Leach, V.-C. ; *Owston* v. *O'Bryan*, Barnes, 145 ; *Smedley* v. *Philpot*, 3 M. & W. 573.

(*t*) *Lloyd* v. *Mason*, 4 Ha. 132 ; *Turwin* v. *Gibson*, (1749) 3 Atk. 720, Hardwicke.

(*u*) *Pelsall Coal Co.* v. *London and North-Western Ry. Co.*, (1893) 8 Times Rep. 629. This was a case of a charging order, but the same principle applies. *Brunton* v. *Electrical Engineering Corporation*, (1892) 1 Ch. 434, was a case of a lien on documents.

(*x*) *Shippey* v. *Grey*, (1880) 42 L. T. 673, C. P. D. ; *Sympson* v. *Prothero*, (1857) 5 W. R. 814, Wood, V.-C. ; *The "Jeff Davis,"* 1868, L. R. 2 A. & E. 1 ; *The "Leader," ibid.* 314 ; *Hough* v. *Edwards*, 1 H. & N. 171 ; *Birchall* v. *Pugin*, (1875) L. R. 10 C. P. 397 ; *Dallow* v. *Garrold*, (1885) 14 Q. B. D. 543, App. ; *Eisdell* v. *Cunningham*, (1859) 28 L. J. Ex. 213.

(*y*) *Ridd* v. *Thorne*, (1902) 2 Ch. 344, Joyce, J. ; *Cormick* v. *Ronayne*, 22 L. R. Ir. 140, Ex.

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the recent Act restricting the rights of the Crown it is apprehended that no such question could arise.

Insolvent partnership.

In bankruptcy the rule as to a solicitor's lien on assets administered in a partnership suit before the bankruptcy is as follows: if a solicitor commences a partnership action and gets a receiver appointed he is entitled to a lien on the assets recovered for his costs, unless he knew that the partnership was insolvent and commenced the action merely to obtain costs when proceedings might have been taken in the bankruptcy (*z*).

Solicitor of defaulting trustee.

His lien is subject to his client refunding.

In the case of trust estates the general rule is that the solicitor of a person claiming any part of a trust estate cannot have any higher right than his client would have, and that therefore the trustees can set off against costs payable out of the trust estate to a person indebted to the trust estate the amount of his indebtedness, and that the lien of that person's solicitor on such costs cannot be invoked to prevent the set-off (*a*).

A solicitor employed by a trustee is not, strictly speaking, solicitor to the trust estate, but he is the person employed by the trustee for his own purposes as trustee. The trustee personally is liable to pay the costs, and he alone is the person to whom the solicitor can look for payment, though of course the trustee has a right of indemnity out of his estate. The solicitor of the trustee has no lien whatever upon the trust estate for those costs. That is the general rule; but there are certain exceptions to it by which a trustee's solicitor may have a better claim. He may, for instance, have got a statutory charging order by reason of his having recovered or preserved some part of the trust estate, or he may have a lien on documents in his hands. He may have a right, as between himself and his client, to go against that client's share of the trust

(*z*) *Exp. Lovett, re Nicholas and Payne*, (1889) 61 L. T. 87, Cave, J.

(*a*) *Re Harrald, Wilde* v. *Walford*, (1884) 51 L. T. 441; *Harmer* v. *Harris*, (1826) 1 Russ. 155.

estate ; but, except in those cases, he has no claim on the trust estate.

Moreover, if a trustee is found on taking the accounts in an action for the administration of the trust estate to be indebted to the estate, his solicitor will not be allowed to take the trustee's costs out of the estate until his client has made good to the estate the amount of his indebtedness ; and if the solicitor has been paid such costs even under an order of the Court, he will be compelled to refund them (*b*). Indeed, this principle is applied with such strictness that if that solicitor has ceased to act for the trustee after receiving the costs, and is succeeded by another solicitor who claims costs properly incurred by himself in the execution of the trusts, this second solicitor will not be allowed to take his own costs out of the trust estate until the former costs are refunded (*c*). The reason of this rule is that the solicitor can have no higher claim against the trust fund than his client, the trustee, has, and the client, the trustee, can take no benefit until the prior claim of the *cestuis que trustent* is satisfied.

Receiver's solicitor.

A plaintiff's solicitor who has received rents before the receiver's appointment is completed must hand them over to the receiver, and his claim to a lien thereon will not be regarded (*cc*).

Different rule applies to solicitor for liquidator.

The rule laid down as to the position and rights of a solicitor to a trustee which has just been mentioned does not apply to the solicitor to a liquidator, whether the winding up of the company is compulsory, voluntary, or under supervision. The liquidator's solicitor is not considered as employed by him, but by the company itself, and as the liquidator is not personally liable to the solicitor for his costs (*d*), it is apprehended that the

(*b*) *Staniar* v. *Evans*, (1886) 34 C. D. 470, North, J.

(*c*) *Re Scowby*, (1897) 1 Ch. 741, App. ; *Francis* v. *Francis*, (1854) 5 D. M. & G. 108, L.JJ.

(*cc*) *Wickens* v. *Townsend*, (1830) 1 R. & M. 361, 32 Rev. Rep. 221.

(*d*) *Anglo-Moravian Co., exp. Watkin*, (1876) 1 C. D. 130, App., and the cases there cited.

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solicitor may get his costs incurred in the winding up even if the liquidator makes default in accounting for what he has received on behalf of the company. This point has not yet been actually decided, but the views just expressed appear to be in accordance with principle, though not covered by authority.

Sect. V.

FOR WHAT DEBTS, CLAIMS, INTEREST, AND COSTS THE LIEN ON FUNDS CAN BE ASSERTED.

Lien on funds is strictly special, *not* general.

This lien on funds, unlike the lien on papers, which is general, and also unlike the solicitor's general lien on monies which come into his hands, which is likewise general, is special or particular ; that is to say, it extends only to the costs of the particular proceeding in which the fund was recovered, and it makes no difference that the fund was recovered by means of a deed belonging to the client on which the solicitor already had a lien, which, like all liens on documents, was a general one (*e*).

A solicitor's general lien on monies received amounts practically to little, if anything, more than a right of set-off of the solicitor's general bill of costs against monies which have actually come into his hands on behalf of his client (*f*) ; and as there has been very little controversy on this branch of the law of lien, we shall not have occasion to say much about it.

As the solicitor's lien upon a fund recovered is special, it follows that his lien on a judgment is limited to the costs of the particular action in which it was recovered,

(*e*) *Bozon* v. *Bolland*, (1839) 4 My. & Cr. 354, Cottenham, C. ; *Lann* v. *Church*, 4 Madd. 391 ; *Mackenzie* v. *Mackintosh*, (1891) 64 L. T. 706, App. ; *Smith* v. *Betty*, (1903) 2 K. B. 317 ; *Hall* v. *Laver*, 1 Ha. 571 ; *Lucas* v. *Peacock*, 9 Beav. 177.

(*f*) *Mackenzie* v. *Mackintosh*, (1891) 64 L. T. 706, App.

and that he cannot, as against a person who has obtained a garnishee order against the defendant by virtue of a judgment obtained by that person against the plaintiff, assert a lien for his general bill of costs against the plaintiff in addition to his costs of that particular action unless there had been a special agreement between the solicitor and his client, the plaintiff, that the lien on the judgment should extend to the general costs (*g*). Where a claim in a winding up by the client is transferred to a purchaser, and the same solicitor continues the proceedings on behalf of the purchaser, his lien extends to all the costs from start to finish (*h*).

Before the Judicature Acts proceedings in error were treated as part of the cause for the purpose of the attorney's lien, which extended to the costs in error as well as to those in the Court below; and under the present practice the lien extends to the costs of appeal from the judgment, and also to appeals from all other orders made in the same action (*i*).

Lien extends to costs of appeal,

The lien also extends to costs incurred by the solicitor in successfully asserting his right to the lien, and to the costs of establishing his retainer where the client disputes it, including the costs of an unsuccessful appeal from the order that established the retainer (*k*).

and to costs of establishing retainer.

The Court directs the costs that are the subject of the solicitor's lien to be taxed as between solicitor and client (*l*).

Before the Judicature Acts and the present rules of practice it was held in some old cases that a solicitor of a pauper litigant who had won his case and was

(*g*) *Hough* v. *Edwards*, (1857) 1 H. & N. 171.

(*h*) *General Share Co.* v. *Chapman*, (1875) 1 C. P. D. 771.

(*i*) *Blakey* v. *Latham*, (1889) 41 C. D. 518.

(*k*) *Re Hill*, (1886) 33 C. D. 266, App.; *Lucas* v. *Peacock*, (1846) Beav. 177.

(*l*) *Watson* v. *Maskell*, 1 Bing. N. C. 727; *Lloyd* v. *Mason*, 4 Ha. 139; cf. *Scholey* v. *Peck*, (1893) 1 Ch. 709, Romer, J., and *Waterland* v. *Serle*, W. N. (1897) 163.

Chap. II. Sect. V.

As to action *in formâ pauperis.*

entitled in Courts of equity to *dives* costs was entitled to prevent even a *bonâ fide* compromise which would have the effect of prejudicing his lien, but these cases cannot be considered to be any longer law, for it has been recently decided that a successful litigant suing *in formâ pauperis* is not now entitled to dives costs, but only to his expenses out of pocket (including a reasonable sum for office expenses) and the costs due to the solicitor and counsel for obtaining the necessary certificate (*m*). In the House of Lords appeals a different rule prevails (*n*).

Solicitor appearing in person entitled to usual charges except instructions.

When a solicitor acts in person, whether in an action simply or in other proceedings, including those in which he establishes or protects his lien, and he is awarded his costs of the application, he is to be allowed not merely his costs out of pocket, but also his professional charges, just as if he were acting for a client, except that the taxing master does not allow any items for work not actually done or necessary to be done. For instance, nothing is allowed him for "instructions" (*o*).

Interest on costs can be allowed, but rarely is.

Before the Solicitors Act, 1860, the solicitor's lien did not extend to interest on the costs, nor even to interest on such part of the costs as consisted of payments out of pocket for counsel's fees, Court fees, witnesses' expenses, and the like; but now by the 27th section of that Act it is provided as follows:—

"27. Whenever a decree or order is made by the Court of Chancery in which the payment of any costs previously taxed, either in the suit or proceeding in which such decree or order is made or in any other suit or proceeding, is ordered, and whether the certificate of such previous taxation have been made before the passing of this Act or be made thereafter, it shall be lawful for the

(*m*) *Richardson* v. *Richardson and Plowman*, (1895) P. 276, App., and cases there cited.

(*n*) *Re Raphael*, (1899) 1 Ch. 853.

(*o*) *London Scottish Benefit Society* v. *Chorley*, (1884) 13 Q. B. D. 872; *Bidder* v. *Bridges*, (1887) W. N. 208.

Court or Judge making such decree or order to order and direct the amount of such costs as taxed, including the costs of taxation as ascertained by the said certificate, to be paid, with interest thereon at the rate of four pounds per cent. per annum from the date of the certificate, the amount of such interest to be verified by affidavit, and to be payable and recoverable out of the same fund or in the same manner as the amount of such costs."

The power given to the Court by this 27th section has been very sparingly exercised (*p*). Where interest may be given, it is conceived that the Court would require strong proof that the delay in payment was not due to any neglect or delay on the part of the solicitor.

By the Solicitors Act, 1870, sec. 17, the Taxing Master has power if he thinks fit to allow interest on payments out of pocket.

Lien extends to professional costs only.

The lien on funds does not extend to any debts but professional charges and disbursements due to the solicitor. For example, he cannot assert any lien for money paid by him for his client even to pay off a lien due to the former solicitor, nor for money lent to the client (*q*). He cannot assert his general lien on documents for such payments or loans, and *à fortiori* he cannot set up his special lien on funds for them. See, however, p. 74, note (*m*).

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Lapse of time and the Statutes of Limitation.

Statutes of Limitation no bar to lien on funds.

The Statutes of Limitation do not apply to the solicitor's lien. They only bar the remedy by action,

(*p*) Lord Romilly allowed interest in *Re Campbell*, (1871) 19 W. R. 427; but Mr. Justice Chitty refused it in *Re Marsden*, (1889) 40 C. D. 475.

(*q*) *Re Galland*, (1885) 31 C. D. 296, App.; *Re Taylor*, (1891) 1 Ch. 590, App.; *Re Anglo-Maltese Co.*, (1885) 52 L. T. 841; *Re Capital Fire Co.*, (1883) 24 C. D. 408, App.; *Bissill* v. *Bradford Tramways Co.*, 9 Times Rep. 337; *Re Hanbury & Co.*, (1896) 75 L. T. 449, Stirling, J.; *Irving* v. *Viana*, 2 Y. & J. 70; *Jones* v. *Turnbull*, 5 Dowl. P. C. 591; *Re Foster*, (1904) 116 L. T. Jo. 388.

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and afford no ground for resisting an application to the Court by motion or summons to give effect to the lien (*r*). Just as a solicitor has a right to retain a document by virtue of his lien notwithstanding that the Statutes of Limitation have barred his right to bring an action for the amount of his bill of costs, so he may apply by motion or summons to enforce his lien on funds. A motion or summons is not an action, and the language of the Statutes of Limitation will not be extended to include those forms of proceeding. It required express words in the 28th section of the Solicitors Act, 1860 (see *ante*, p. 8), to make the Statutes of Limitation a bar to proceedings under that section to obtain a charging order, and but for those words the statutes would not have been a bar.

But although the statutes are not a bar, it does not follow that the solicitor can be as dilatory as he pleases with impunity, for where his delay has been excessive, and the rights of other persons have suffered in consequence, the Court may refuse to exercise its equitable interference on his behalf or at least refuse to give him the costs of the application.

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on what grounds the claim of lien can be resisted.

Lien cannot prevent *bonâ fide* compromise, but lien attaches to fruits of compromise.

Another ground of resistance to the solicitor's lien is that a *bonâ fide* compromise has been entered into between the litigants, and the money paid over in good faith, without any intention of depriving the solicitor of his lien, and without notice of his lien. The law is well

(*r*) *Spears* v. *Hartley*, 3 Esp. 81; *Higgins* v. *Scott*, 2 B. & Ad. 413; *Re Carter*, (1886) 53 L. T. 630, Kay, J.

summarised in the passage quoted from Chitty's Archbold's Practice; see p. 42, *ante*.

Ross v. *Buxton* (1889).

This passage has been decided to be a correct statement of the law in the very important case of *Ross* v. *Buxton*, (1889) 42 C. D. 190, in which Mr. Justice Stirling reviewed the earlier decisions given during the last hundred and fifty years, which were somewhat conflicting, and decided to follow those decisions which gave full effect to a solicitor's lien and not to follow those which, speaking broadly, refused to give effect to it except in those cases where actual fraud or collusive conspiracy could be proved.

The doctrine laid down above will be made clearer by a few examples :—

Welsh v. *Hole*.

In *Welsh* v. *Hole* (*s*), Lord Mansfield said: "A payment by the defendant after such notice [of the plaintiff's attorney's lien] would be in his own wrong and like paying a debt which has been assigned after notice. . . . As against the right of the assignee, the debtor after notice could not in equity discharge himself by a payment to the principal."

Ormerod v. *Tate*.

In *Ormerod* v. *Tate* (*t*), Lord Kenyon and his brother Judges held that if, after notice given by the plaintiff's attorney of his lien to the defendant, the latter pay a sum awarded to the plaintiff direct, the plaintiff's attorney might obtain a rule calling on the defendant to show cause why he should not pay him his costs in the cause out of the money so awarded to the plaintiff and also the costs of the application.

Read v. *Dupper*.

The same learned Judge in *Read* v. *Dupper* (*u*) said, "If here the money had been paid over *bonâ fide* to the plaintiff before notice from his attorney of his lien, such payment would have been good."

The defendant's attorney, however, paid the whole

(*s*) 1 Doug. 237.
(*t*) (1801) 1 East, 464.
(*u*) (1795) 6 T. R. 361.

sum to the plaintiff himself, notwithstanding that he had had notice from the plaintiff's attorneys not to pay it to the plaintiff himself, because their bill was not satisfied. The Court therefore ordered the defendant's attorney personally to pay the amount of the plaintiff's attorney's lien to them.

White v. *Pearce.*

The same doctrine was laid down in the Court of Chancery in the case of *White* v. *Pearce* (*x*) by Vice-Chancellor Wigram. The suit was for foreclosure in which a decree for sale was made by consent. The plaintiff's solicitor prosecuted the suit to the settlement of the particulars and conditions and appointment of the day of sale. The plaintiff's solicitor gave notice of his lien to the defendant and his solicitors. The parties then compromised on the terms of paying the plaintiff 300*l.* in discharge of the debt and costs. Part of this sum was paid accordingly. The Vice-Chancellor held that the plaintiff's solicitor had undoubtedly a lien for his costs upon whatever had been received or paid for compromising the suit, and upon the petition of the plaintiff's solicitor the Court directed the plaintiff and defendant, or one of them, to pay the solicitor his taxed costs in the suit, not exceeding in the whole the sum of 300*l.*

Exp. Bryant.

In bankruptcy, too, similar protection was given to the solicitor, and in *Exp. Bryant* (*y*) Sir T. Plumer made an order on the attorney's petition against the Sheriff of London and other parties, who had illegally arrested the bankrupt, to pay the petitioner not only the costs occasioned by the arrest, but also the costs of the application, and the attorney was to be at liberty to proceed against any of the parties for payment of the same.

Davies v. *Lowndes.*

The Court of Common Pleas in a real action in 1847, *Davies* v. *Lowndes* (*z*), protected the attorney's lien under the following circumstances:—the action was a

(*x*) (1850) 7 Ha. 276.
(*y*) 1 Madd. 49 ; 2 Rose, 237.
(*z*) 3 C. B. 808.

writ of right; a verdict was given by consent for the defendant, but on payment of 5,000*l.* to the plaintiff's then attorney, Cook. A former attorney of the plaintiff, Clarke, applied for payment of the amount of his lien out of the 5,000*l.*, and an order was made accordingly. Wilde, C.J., said: "We feel no doubt that Clarke's lien attaches upon the fund in question, and we think it is not extinguished by the taking of securities that have turned out to be worthless."

Slater v. *Mayor of Sunderland*, (1864).

Another important case decided forty years ago is *Slater* v. *The Mayor of Sunderland* (*a*). There a verdict had been found for the plaintiff for 100*l.* subject to a point reserved. Negotiations took place which resulted in a compromise on the terms that the plaintiff should accept the 100*l.* in full satisfaction of the debt and costs. The plaintiff equitably assigned this 100*l.* to another person, but the plaintiff's solicitor gave notice of his lien to the defendant's solicitor and required the 100*l.* to be paid to him. The Court held that a solicitor's lien cannot prevent a *bonâ fide* compromise, but that the Court will will direct the money payable under the compromise and still remaining unpaid to be paid to plaintiff's solicitor or so much as is necessary to satisfy his lien.

The last important decision on this point is *Ross* v. *Buxton* (*b*), decided by Mr. Justice Stirling in 1889, in which the foregoing cases were reviewed and followed, and some unorthodox decisions to the contrary effect were not followed. These latter were not expressly overruled, but practically they have ceased to be treated as binding precedents (*c*) so far as they are inconsistent with *Ross* v. *Buxton*.

(*a*) 33 L. J. Q. B. 37; *Heiron* v. *Hobson*, (1878) 47 L. J. Ch. 574, Hall, V.-C.

(*b*) 42 C. D. 190.

(*c*) They are *Brunsdon* v. *Allard*, 2 E. & E. 19; *Nelson* v. *Wilson*, 6 Bing. 568; *Exp. Hart*, (1830) 1 B. & Ad. 660; *Quested* v. *Callis*, 10 M. & W. 18; *Re Sullivan* v. *Pearson, Exp. Morrison*, L. R. 4 Q. B. 153; *Townsend* v. *Reade*, 4 L. J. N. S. Ch. 233.

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Ross v. *Buxton* (1889).

Ross v. *Buxton* was an action for specific performance. The defendant had paid 50*l.* into Court with a denial of liability, and he also counterclaimed for damages. After reply, but before notice of trial, the plaintiff, behind the back of his solicitor, settled with the defendant, and the terms of settlement were finally arranged on the 2nd November, these terms being that the plaintiff should receive the 50*l.* out of Court in full settlement of all claims. On the 9th November the plaintiff's solicitor gave notice of his lien to the defendant's solicitors, and by the notice directed them not to pay the money to the plaintiff. The defendant's solicitors, in defiance of this notice, paid the 50*l.* to the plaintiff himself. The Court, however, after a full consideration of the older authorities on both sides of the question, held that the plaintiff's solicitor's lien extended to the 50*l.*, and that after notice of such lien the defendant's solicitors had no right to pay the money to the plaintiff personally, and made an order that both the plaintiff and the defendant's solicitors personally must satisfy the lien of the plaintiff's solicitor. The Court, however, did not order the defendant personally to pay it, as there was no evidence that he had personal notice of the lien, which, as we have seen above, is necessary to fix a person with liability unless collusion is proved.

An infant's property is subject to the lien even if the compromise was authorised by the Court on a petition for compromise (*d*).

To establish lien in case of compromise *either* notice *or* collusion essential.

On the other hand, unless either (1) notice of the lien has been given or (2) collusion or fraudulent conspiracy proved, the compromise will not only be valid, but the solicitor will not be able to recover money which has been already paid over in good faith in pursuance of the compromise. A good example of this doctrine is afforded by the decision of the Court of Appeal in *The "Hope,"*

The "Hope," 1883.

(*d*) *Re Wright*, (1901) 1 Ch. 317, App.

an Admiralty case (*e*). The action was by seamen for their wages. It was compromised by payment to each of the plaintiffs of a certain sum in discharge of the wages and costs, and the seamen, the plaintiffs, went abroad without paying their solicitors' costs. There was no proof that the defendants had notice of the plaintiffs' solicitors' lien. It was held that the defendants could not be ordered to pay the plaintiffs' solicitors' costs, the evidence not being clear enough for the purpose of proving collusion and conspiracy to deprive the solicitors of their costs (*f*). In a recent case, however, where a solicitor had presented a petition for the taxation of his client's former solicitor's bill of costs, and the former solicitor paid to the client a sum of 25*l.* in settlement, the Court held on the evidence that the former solicitor knew of the second solicitor's lien, and that the compromise could not be allowed to stand, and the first solicitor was ordered to pay the costs of the second solicitor in relation to the proceedings for taxation, the Court holding that parties may compromise an action without the intervention of solicitors, but they must do so honestly; and that if, therefore, they compromise knowing of the lien of the solicitor, and are intending to defeat it, the compromise will not be allowed to stand (*g*).

Verbal notice is valid, but not safe.

Of course it is always prudent for the solicitor asserting his lien to give express notice of it in writing, as it is usually difficult to prove a verbal notice; but written notice is not essential. We do not find any case deciding that constructive notice as distinguished from express notice is sufficient to fix the party paying the amount of the compromise with liability to the solicitor asserting

(*e*) (1883) 8 P. D. 144.

(*f*) See also *Wiedemann* v. *Walpole*, (1891) 7 Times Rep. 629, App.; *Briscoe* v. *Briscoe*, (1892) 3 Ch. 543, Kekewich, J.; *Price* v. *Crouch*, (1891) 60 L. J. Q. B. 767; *Sanderson* v. *Consolidated Credit Co.*, (1890) 6 Times Rep. 404, Q. B. D.; *Re Murnaghan*, (1903) 2 I. R. 287.

(*g*) *Re Margetson*, (1897) 2 Ch. 314, Kekewich, J.

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the lien; but judging from the analogous case of a charging order, constructive notice would probably be held to be sufficient. In the case of a charging order it has been settled by several decisions that all men of business when dealing with a fund obtained by litigation must be assumed to be aware that the fund is to be considered as subject to the deduction of the costs to be paid to the solicitor who has conducted the litigation to a successful issue, and that it is always right to make the charging order in favour of the solicitor, unless he has been guilty of some *mala fides*, or has stood by while the fund was being dealt with, so as unfairly to prejudice the position of others (*h*). It is apprehended that the same principles would be applied to the lien as to a charging order; and it must of course be borne in mind that in cases where constructive notice only has to be relied on the 3rd section of the Conveyancing Act, 1882, will have to be taken into account.

Notice readily inferred in some cases.

Constructive notice.

Conveyancing Act, 1882, s. 3.

Sect. 3 of the Conveyancing Act, 1882, is as follows:

"(1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless—

"(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him, or

"(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such, if such inquiries and

(*h*) *Dallow* v. *Garrold*, (1885) 14 Q. B. D. 543; *Cole* v. *Eley*, (1894) 2 Q. B. 180, 350, App.; *Ross* v. *Buxton*, (1889) 42 C. D. 190; *The* "*Paris*," (1896) P. 77. *Price* v. *Crouch*, (1891) 60 L. J. 769, Q. B., goes very near deciding that in the case of a lien constructive notice is sufficient. Cf. *Patman* v. *Harland*, (1881) 17 C. D. 353, Jessel, M.R.

inspections had been made as ought reasonably to have been made by the solicitor or other agent.

"(2) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

"(3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

"(4) This section applies to purchases made either before or after the commencement of this Act, save that, where an action is pending at the commencement of this Act, the rights of the parties shall not be affected by this section."

Sect. 1 of the same Act defines a "purchaser" as follows:

"'Purchaser' includes a lessee or mortgagee or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property, and 'purchase' has a meaning corresponding with that of 'purchaser.'"

Another defence that can be set up against the lien on funds is a set-off of costs and debt, damages, or other monies recovered in the same action or proceeding in which the costs in respect of which the lien is claimed were incurred (*i*). We say the *same action or proceeding*, because, although the Court has full power in the exercise of its discretion to allow monies recovered in a separate action to be set off without regard to the lien of the solicitor in the first-mentioned action or proceeding, yet the Courts have decided that if in ordinary cases they

(*i*) *Pringle* v. *Gloag*, (1879) 10 C. D. 676, Jessel, M.R.

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allow a set-off of monies recovered in *separate* actions they will only permit this subject and without prejudice to the lien of the solicitor (*k*).

History of practice of setting off judgments, etc.

As this subject is a little intricate, but of great and frequent practical importance, it may be desirable, with a view to lucid exposition, to trace the history of the practice of the Courts with reference to the set-off of monies recovered by judgments or orders.

In the common law Courts.

Before the year 1832 the three Courts of common law at Westminster allowed a set-off of costs or damages and costs in one action against those in another, and that not only where the parties were the same, but also where they had been in some measure different. Thus a party has been permitted to set off a separate demand for costs payable to himself alone against a joint demand for costs payable by himself and others, or a joint demand for costs payable to himself and another against a separate demand for damages and costs payable by himself only, and the costs of a suit in equity, dismissed in favour of the defendant, have been set off against the plaintiff's costs of an action at law in the King's Bench for the same cause (*l*). Debt and costs were set off against costs in the same action without regard to the solicitor's lien (*m*), but when the costs or damages sought to be set off had been recovered by judgment in different actions there was a diversity of practice in the different Courts. The Court of King's Bench in such a case did not allow the set-off otherwise than subject and without prejudice to the lien of the attorney. The Court of Common Pleas, however, allowed the set-off without regard to such lien, just as the Courts allowed interlocutory costs or damages and costs in the same action to be set off against each other.

(*k*) *Edwards* v. *Hope*, (1885) 14 Q. B. D. 922, App.; *Blakey* v. *Latham*, (1889) 41 C. D. 518, Kay, J.; *Hassell* v. *Stanley*, (1896) 1 Ch. 607, Chitty, J.

(*l*) Tidd's Pr. 3rd edit. p. 991.

(*m*) *Lees* v. *Reffit*, (1835) 3 A. & E. 707; *George* v. *Elston*, (1835) 1 Bing. N. C. 513.

In the Court of Exchequer the decisions were not uniform. In some cases they followed the practice of the King's Bench, and in others that of the Common Pleas. The decisions of the Court of Chancery were conflicting: when allowing a set-off in separate suits or actions they sometimes respected the solicitor's lien, and sometimes they did not.

In chancery.

In the year 1832 general rules were made by all three Courts of common law providing (r. 93) that no set-off of damages or costs should be allowed to the prejudice of the attorney's lien for costs in the particular suit against which the set-off was sought, but that interlocutory costs in the same suit awarded to the adverse party might be deducted.

In the year 1853 rules of practice were made under the Common Law Procedure Act, 1852, which were essentially the same as those of 1832 on this question of set-off.

Rules under Judicature Act.

By the Rules of the Supreme Court of Judicature, 1883, Order LXV. r. 14, it is provided as follows:—

"A set-off for damages or costs between parties may be allowed notwithstanding the solicitor's lien for costs in the particular cause or matter in which the set-off is sought."

It has been decided that the effect of this rule is to give the Court a discretion to allow or not to allow the set-off, and if it allows it, it can do so either subject to or without regard to the solicitor's lien, but this discretion is one to be judicially exercised, and regard is to be had to previous decisions on the subject. The result of the decisions on the subject may be shortly stated thus:—

Result of decisions.

(1) Interlocutory costs and costs, damages, and other monies recovered in the same action will be set off against each other without regard to the solicitor's liens, and even if a recent Irish decision is right (which it probably is) to the extent of setting off a successful defendant's costs against the plaintiffs' damages recovered against another defendant; in other words, the solicitor has a lien

(1) Interlocutory costs.

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only on the net balance coming to his client in the same action and not on the gross amount (*n*). (2) For the purpose of applying this rule an appeal is treated as a step in the action, so that costs ordered to be paid by the Court of Appeal can be set off against monies payable to the opposite party, and the solicitor's lien cannot be invoked to prevent this result, but a different rule obtains in the House of Lords. Costs of an application to discharge a receiver after judgment can likewise be set off against the costs of judgment (*o*). So, too, claim and counterclaim are treated as one action; and the lien of the solicitor extends to the balance only (*p*). (3) Monies recovered in one action will not as a rule be allowed to be set off against monies recovered in a separate action otherwise than subject and without prejudice to the solicitor's lien. (4) And *à fortiori* the rule will be applied if the separate actions or proceedings are in different Courts, *e.g.*, the High Court and the county court (*q*); (5) and a simple contract debt will not be allowed to be set off against a judgment to the prejudice of the solicitor's lien (*r*). (6) Costs in bankruptcy proceedings are to be kept quite distinct from monies recovered in other proceedings, and so strict is this rule that the Court will not allow even the costs of an appeal to the High Court from a

(2) Appeal.

Costs against the damages and costs payable by another defendant to the plaintiff.

Claim and counterclaim.

(3) Separate actions.

(4) Actions in different Courts.

(5) Simple contract debt.

(6) Bankruptcy costs.

(*n*) *Pringle* v. *Gloag*, (1879) 10 C. D. 676, Jessel, M.R.; *Blakey* v. *Latham*, (1889) 41 C. D. 518, Kay, J.; *Edwards* v. *Hope*, (1885), 4 Q. B. D. 922, App.; *McCormack* v. *Ross*, (1894) 2 Ir. R. 545; *Robarts* v. *Buée*, (1878) 8 C. D. 198; but costs will not usually be set off in the Divorce Court as between husband and wife: *Hall* v. *Hall*, (1891) P. 302.

(*o*) *Pelton* v. *Harrison*, (1892) 1 Q. B. 118, App.; *Edwards* v. *Hope*, (1885) 14 Q. B. D. 922, App.; *re Crawshay*, (1890) 45 C. D. 318, was an exceptional case; *Russell* v. *Russell*, (1898) A. C. 307.

(*p*) *Westacott* v. *Bevan*, (1891) 1 Q. B. 774.

(*q*) *Blakey* v. *Latham*, (1889) 41 C. D. 518; *Hassell* v. *Stanley*, (1896) 1 Ch. 607; *David* v. *Rees*, (1904) 2 K. B. 435; but see *Goodfellow* v. *Gray*, (1899) 2 Q. B. 498, App. Interpleader proceedings are distinct from the action, and the costs will not be set off, *Barker* v. *Hemming*, (1880) 5 Q. B. D. 609.

(*r*) *Re Dickenson*, (1888) W. N. 94.

county court sitting in bankruptcy to be set off against the costs of an appeal to the High Court from a county court exercising its equity jurisdiction even where the parties to both appeals are the same (*rr*). (7) Where a person is indebted to a trust estate he is not entitled to any costs or anything else out of such estate until he has paid the balance due from him to it, and his solicitor cannot be in any better position than his client the trustee, so in such a case the solicitor's lien will not prevent the set-off (*s*). (8) Where taxed costs are directed to be paid out of a fund in Court to the town agent of a country solicitor, and the country solicitor has in his hands as much or more of the trust estate than the amount of the taxed costs, these costs will be deemed to be satisfied by the amount in the country solicitor's hands, and the costs ordered to be paid to the London agent will be paid over to the client of the country solicitor (*t*).

(7) Defaulting trustee's costs.

(8) Town agent of defaulting country solicitor.

Calls payable by a contributory of a company which is being wound up cannot be set off against costs of a petition presented by that contributory, and upon which the winding-up order was made (*u*).

Costs of contributory as petitioner.

The old decisions of the Courts of common law and equity to which we have alluded having been given before the publication of Order LXV. r. 14, are obsolete as authorities; but, inasmuch as they may afford useful aids to reason in future cases, we have inserted a classified list of the principal cases in Appendix II., near the end of this volume.

It will be seen from the modern decisions cited above

(*rr*) *Exp. Griffin, re Adams*, (1880) 14 C. D. 37, App.; *Re Bassett*, (1896) 1 Q. B. 219, Vaughan Williams; *Exp. Cleland*, (1866) L. R. 2 Ch. 808; *Bank of Hindustan, China, and Japan, exp. Smith*, (1867) L. R. 3 Ch. 125.

(*s*) *Re Harrald, Wilde* v. *Walford*, (1884) 51 L. T. 441; *Staniar* v. *Evans*, (1887) 34 C. D. 470.

(*t*) *Peatfield* v. *Barlow*, (1869) L. R. 8 Eq. 61; cf. *Hannaford* v. *Syms*, (1898) 79 L. T. 30.

(*u*) *Re General Exchange Bank*, (1867) L. R. 4 Eq. 138. As to solicitors' lien on costs payable under an order of compromise, see *Heiron* v. *Hobson*, (1878) 47 L. J. Chy. 574.

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that Order LXV. r. 14 has made very little difference, if any, in the practice as regulated by the General Orders of 1832.

Town Agent.

A town agent appears to be in a less favourable position as regards lien than a solicitor properly concerned. The town agent probably cannot use his lien to prevent a set-off of judgments (*x*).

In the county court a set-off can take place of two judgments in the same or different county courts by reason of a special provision in the County Court Act to that effect (*y*).

No lien for costs of *ultra vires* proceedings of company.

As a general rule a solicitor must, in order to assert his lien, have done the business on the retainer of a client who is capable of retaining him; and therefore where a solicitor was employed by the board of directors of a company to do certain acts which were a violation of the fundamental constitution of the company and consequently *ultra vires* it was held that he had no claim and consequently no lien (*z*).

Neglect.

Lord St. Leonards said in a well-known case that a solicitor may forfeit his lien on a fund in Court by neglecting the prosecution of the cause or otherwise causing loss or damage to the parties interested (*a*).

Waiver of lien.

A lien may be waived by words or by actions. Taking a worthless security was decided in a well-known case (*b*) not to be a waiver. Indeed, it is doubtful whether taking a security is a waiver unless there is something in the nature of the security, or in the circumstances under which it was taken, which is inconsistent with the continuance of the lien and therefore destructive of it. At

(*x*) *Van Sandau* v. *Burt*, 1 D. & R. 168; but see *Lawrence* v. *Fletcher*, (1879) 12 C. D. 858, Fry.

(*y*) *Ward* v. *Haddrill*, (1904) 1 K. B. 399; and County Courts Act, 1888, s. 150.

(*z*) *Re Phœnix Life Assurance Society*, (1863) 1 H. & M. 433.

(*a*) *Molesworth* v. *Robbins*, 2 Jo. & Lat. 373.

(*b*) *Davies* v. *Lowndes*, 3 C. B. 829, followed on another point in the well-known case of *Ross* v. *Buxton*, (1889) 42 C. D. 190, Stirling, J.

Taking security usually waives lien.

the same time there are cases to the effect that the taking of a valuable security is a waiver, so that when taking a security it is a prudent precaution to state in writing signed by both parties whether the security is to be a waiver of the lien or not (*c*). See forms in Appendix I.

In one case (*d*), Lord Justice Lindley said, that whether a lien is waived or not by taking security depends on the intention of the parties. This referred to a solicitor's lien on papers, but with some exceptions the same principles apply to the lien on funds as to the lien on papers (*e*).

Arrest of client not a waiver.

Under the old law before the abolition of arrest for debt a solicitor did not waive his lien by proceeding to arrest his client (*f*), and it is conceived that he would not waive his lien at the present day by arresting him for any of the causes mentioned in the Debtors' Acts, 1869 and 1878.

Nor bringing action.

Bringing an action for the recovery of the bill of costs does not waive any lien (*g*).

Solicitor discharging himself.

Probably if a solicitor discharges himself, even for reasonable cause, from acting further for his client, he loses his lien, according to a dictum of Lord Eldon (*h*), but in the analogous case of a charging order under the 28th section of the Solicitors Act, 1860, the solicitor can obtain that order notwithstanding that he has discharged himself if the grounds upon which he retired from the case were reasonable (*i*).

Payment or tender.

Another defence to the claim of lien is payment or tender

(*c*) *Taylor, Stileman, and Underwood*, (1891) 1 Ch. 590 ; *Re Douglas Norman & Co.*, (1898) 1 Ch. 199, North, J. (these were cases of the lien on documents, but the same principle applies to the lien on funds); *Tharratt* v. *Trevor*, 7 Ex. 161; *Groom* v. *Cheesewright*, (1895) 1 Ch. 730, Kekewich, J.

(*d*) *Re Taylor, Stileman, and Underwood*, (1891) 1 Ch. 590.

(*e*) *Lawrence* v. *Fletcher*, 12 C. D. 858 ; cf. *Hannaford* v. *Syms*, (1898) 79 L. T. 30.

(*f*) *Lloyd* v. *Mason*, 4 Ha. 132, and see p. 116, *post*.

(*g*) *Kearney* v. *Carroll*, Glascock, 173 ; *re Aiken*, (1894) 1 Ir. R. 225.

(*h*) *Cresswell* v. *Byron*, 14 Ves. 271.

(*i*) *Clover* v. *Adams*, (1880) 6 Q. B. D. 622.

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of the demand (*k*). This demand will consist not merely of the amount of the solicitor's costs in the particular matter, but also, it is submitted, the costs of any proceedings taken to enforce or protect the lien (see *ante*, p. 57). In the analogous case of a charging order under sect. 28, this is undoubtedly the case (*l*). It would appear however, though the rule seems harsh, that the solicitor cannot insist upon being repaid money that he has paid to the solicitor who was his predecessor in the case in discharge of that former solicitor's costs, for, as we have seen (p. 59), the lien does not extend to such payment (*m*).

We have explained in the first part of this work relating to charging orders that where there has been a succession of solicitors they are entitled to priority of charge in the inverse order to the date of their employment, so that the last has the first charge, and the first the last (*ante*, p. 22) (*n*).

Priorities of liens of successive solicitors.

The same rule applies to the lien on funds (*o*). In the winding up of companies, however, a different rule prevails. In such cases the costs of the petitioner are a first charge before even the costs of the official liquidator; and when the liquidator has changed his solicitor the successive solicitors are entitled to be paid rateably unless a special arrangement has been made to the contrary (*p*).

Different rule in winding up of companies.

This different mode of dealing with successive solicitors' costs in a winding up from that adopted in an action seems founded on common sense, because in an action there is but one result, and the last solicitor has rendered more meritorious services in bringing it about than his

(*k*) *Emma Silver Mining Company*, 24 W. R. 54.

(*l*) *Waterland* v. *Serle*, (1897) W. N. 163, App.

(*m*) It may be a question, however, whether he would not be allowed to stand in the shoes of the former solicitor upon the principle of subrogation applied to other circumstances in the cases of *Wenlock* (*Baroness*) v. *River Dee Company*, (1887) 19 Q. B. D. 155, and *Re Wrexham, Mold, and Connah's Quay Ry. Co.*, (1899) W. N. 22 (4); (1899) 1 Ch. 440.

(*n*) *Re Wadsworth, Rhodes* v. *Sugden*, (1887) 34 C. D. 155, Kay, J.

(*o*) *Cormack* v. *Beisly*, 3 De G. & J. 162, App.; but see *Hough* v. *Edwards*, 1 H. & N. 172, and *Potter* v. *Hyatt*, 2 Y. & C. 116, Abinger, C.B.

(*p*) *Audley Hall Cotton-spinning Co.*, (1868) 6 Eq. 245.

predecessor, the last one being the one who actually obtained the judgment; whereas in a winding up there are many and various assets to be realised, and several funds to be recovered, and it may, and frequently does, happen that the earliest solicitor realised more funds than his successors.

Remedies against last solicitor for not accounting to former solicitors.

Where the solicitor employed in an action in the Chancery Division in which the costs from the beginning are directed to be taxed and paid out of a fund in Court with the assent of his client compromises the matter by accepting a fixed sum instead of proceeding to a taxation and applies the money to his own use, the lien of the former solicitors is gone, but they all have their actions against the last solicitor for money had and received to their use respectively (*q*), or the Court has summary jurisdiction over the last solicitor as an officer of the Court to compel the payment to the former solicitors (*r*); and it is apprehended that if the person paying the fixed sum had notice of the lien of the former solicitors or colluded with the last solicitor to cheat the former solicitors out of their costs such person could be compelled to pay them the amount of their lien, and that under the same circumstances the last solicitor could also be compelled to pay the amount of such respective liens (*s*).

Sect. VIII.

REMEDIES AND PROCEDURE.

One great difference between the lien on papers and the general lien on monies in a solicitor's hands on the

(*q*) *Mornington* v. *Wellesley*, (1858) 4 Jur. N. S. 6, Wood, V.-C.

(*r*) *Exp. Bailey and Hope, re Barnard*, 14 Beav. 18, Langdale, M.R. This was the converse case of compelling the former solicitor to pay the latter solicitor, but the same principle applies.

(*s*) *Ross* v. *Buxton*, (1889) 42 C. D. 190, Stirling, J.; *Price* v. *Crouch*, (1891) 60 L. J. Q. B. 767; *Re Margetson and Jones*, (1897) 2 Ch. 314, Kekewich, J.

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one hand and the particular lien on monies recovered on the other is that the two former are merely inert or passive, while the latter is a lien that can be actively enforced by various remedies according to the nature of the property subject to the lien.

Stop order.

Where this property consists of a fund in Court a stop order can be obtained on motion or summons (*t*). This order is a familiar remedy in the Chancery Division where any charge, incumbrance, or lien is claimed on a fund in Court, and the person claiming a charge, incumbrance, or lien shows a *primâ facie* case. It directs that the fund shall not be sold, transferred, or otherwise dealt with, without notice to the person applying for the order. Although this order was first invented in the Court of Chancery, it is in use in the King's Bench Division likewise when money is in Court. It is in the nature of an interlocutory and precautionary proceeding to ensure notice to the person applying for it, and does not finally decide anything as to the rights of the parties (*u*), and under Order XLVI. r. 12 the applicant is liable to pay any costs occasioned by the making of the order in case the Court should ultimately decide that he ought to pay them (*x*).

Injunction.

Where the fund is not in Court, but in the hands of a third person such as the defendant or other adverse litigant, the solicitor claiming the lien can apply for an injunction restraining his client from receiving, and the other party from paying, the amount

(*t*) *Smith* v. *Winter*, (1869) 18 W. R. 447, James, V.-C.; *Wilkins* v. *Carmichael*, 1 Doug. 104; *Hobson* v. *Sherwood*, 8 Beav. 486; *Bozon* v. *Bolland*, (1839), 4 M. & Cr. 354; *Verity* v. *Wylde*, (1859) 4 Dr. 427, Kindersley, V.-C.; *Lucas* v. *Peacock*, (1846) 9 Beav. 177.

(*u*) *Hawkesley* v. *Gowan*, (1864) 12 W. R. 1100, and cases cited in preceding note.

(*x*) For detailed information as to obtaining a stop order and lodging it with the Paymaster-General, see Annual Practice, Order XLVI. rr. 12 and 13; also Daniell's Chanc. Prac., Seton on Judgments, and Pemberton on Judgments.

without previously paying the amount of the solicitor's lien (*y*).

In a case in the Court of Chancery before the Judicature Acts (*z*), it was held that a solicitor could file a bill of complaint praying for a declaration of his lien, and for an injunction similar to that which has just been spoken of; but at the present day the Courts would probably not encourage a separate action being brought to protect a solicitor's lien, as it would be doubtless considered that the proper course was to proceed by summons or motion in the original action in which the property forming the subject of the lien was recovered. That certainly is the course which has been adopted in recent cases (*a*).

Intervention for protection of lien on a motion, petition, further consideration, &c.

Another mode of enforcing the solicitor's lien is by appearing on a motion made by one of the parties and intervening for protection of his lien (*b*). For instance, if a motion is made to set off a judgment recovered in one action against one recovered in another the solicitor may appear and oppose (*c*). He may also appear on the further consideration (*d*), or on a petition or summons for payment out of Court, and oppose any order being made except subject and without prejudice to his lien (*e*). He may likewise appear and oppose any application by the opposite party to stay proceedings where the compromise

(*y*) *Welsh* v. *Hole*, 1 Doug. 238 (1847); *Davies* v. *Lowndes*, 3 C. B. 808; *Lloyd* v. *Jones*, (1879) 40 L. T. 514.

(*z*) *Sympson* v. *Protheroe*, (1857) 3 Jur. N. S. 711, Wood, V.-C. In *Gerard* v. *Dawes*, (1859) 18 W. R. 33, Stuart, V.-C., granted an injunction *ex parte* to restrain the client from receiving the Accountant-General's cheque until the hearing of a petition to assert the solicitor's lien.

(*a*) *Lawrence* v. *Fletcher*, (1878) 12 C. D. 858, Fry, J.; *Ross* v. *Buxton*, (1889) 42 C. D. 190, Stirling, J.; *Lloyd* v. *Jones*, (1879) 40 L. T. 514, Fry, J.

(*b*) *Taylor* v. *Cooke*, Younge, 201.

(*c*) *Cattell* v. *Simons*, 6 Beav. 304; *Smith* v. *Brocklesby*, 1 Anst. 61; *Irving* v. *Viana*, 2 Y. & J. 70; *Williams* v. *Edwards*, 2 Sim. 83.

(*d*) *Harmer* v. *Harris*, 1 Russ. 155; but he cannot oppose a *bonâ fide* motion for a new trial; *Wiedemann* v. *Walpole*, (1891) 7 Times Rep. 629, App.

(*e*) *Fairland* v. *Enever*, 1 Dick. 114.

has been made collusively (*f*), and if, in pursuance of any such collusive compromise, a bill or other security has been given or deposited with a third party, the Court will make an order that it be given up to the solicitor (*g*). It seems, however, that if money has been paid to his client, he cannot sue the latter for money had and received to his use (*h*), but this is a mere technicality, for he has other remedies just as effectual.

Collusive compromise may be set aside, and solicitor allowed to proceed with action.

The solicitor may in the case of a collusive compromise apply to the Court to set it aside, and for leave to go on with the action, and even to issue execution if judgment has been obtained, and the Court will either give such leave or order the opposite party or his solicitor to pay the amount of the lien (*i*).

Lien on sum awarded by arbitrator.

When the action has been referred to arbitration, and an award has been made, the plaintiff's solicitor can apply to the Court that the damages and costs awarded to his client may be directed to be paid to him, instead of to his client, and where there has been no reference, but the plaintiff's solicitor has recovered judgment, and has given notice of his lien to the defendant, he can obtain a similar order (*k*). In such a case it is probably not necessary to serve the notice of motion or summons on the defendant. It should be sufficient to serve it on the client and serve the order when obtained on the defendant, for it is a matter of indifference to him whom he pays so long as he is protected by an order of the Court. If he is served, written notice ought to be given to him at the same time that he need not appear, and that his costs of appearance will be objected to.

(*f*) *Price* v. *Crouch*, (1891) 60 L. J. Q. B. 767; *Sanderson* v. *Consolidated, &c., Co.*, (1890) 6 Times Rep. 404.

(*g*) *Gould* v. *Davis*, 1 Cr. & J. 415.

(*h*) *Smedley* v. *Philpot*, 3 M. & W. 583.

(*i*) *Price* v. *Crouch, ubi supra; Sanderson* v. *Consolidated Co., ubi supra; Re Margetson and Jones*, (1897) 2 Ch. 314, Kekewich, J.; *Ross* v. *Buxton*, (1889) 42 C. D. 190, Stirling, J.

(*k*) Seton on Judgments, 6th edit. p. 1090; *Ormerod* v. *Tate*, (1801) 1 East 464.

An old case (*l*) decided that when an award directs cross judgments to be set off against each other, without providing for the payment of the attorney's lien, the attorney might apply to the Court to set aside that part of the award, and there seems no reason to suppose that case would not be followed at the present day, if the two judgments were recovered in different actions. If, however, they were recovered in the same action, the Court would probably not interfere (*ante*, p. 70).

Award set aside if it prejudices lien.

The defendant's solicitor has the same lien on damages, costs, or other monies awarded either by judgment or by arbitrator's award to his client as a plaintiff's solicitor has on monies recovered by him for his client (*m*); but whether he can prevent a compromise, even though it may be fraudulent or collusive, is doubtful (*n*).

Defendant's solicitor has lien.

If the solicitor has issued execution on a judgment recovered by him for a plaintiff or defendant and gives notice of his lien to the sheriff the latter cannot pay the amount to the client or his trustee in bankruptcy; but the Court will, on the application of the solicitor, order the sheriff to pay the amount to the solicitor together with the costs of the application (*o*).

Sheriff bound to respect solicitor's lien.

Forms of the various summonses, notices of motion, orders, and bills of costs for taxation will be found in Appendix I.

Forms in Appendix.

In the Probate, Divorce, and Admiralty Division of the High Court the remedy of a solicitor in respect of his lien seems rather different. In a divorce case it has been

Lien in probate, divorce, and admiralty cases.

(*l*) *Cowell* v. *Betteley*, (1834) 10 Bing. 432.

(*m*) *Young* v. *Redhead*, (1833) 2 Dowl. P. C. 119; *Doe* d. *Swinton* v. *Sinclair*, 5 Dowl. P. C. 26; *Pounset* v. *Humphreys*, 1 C. P. Coop. 142; *Bawtree* v. *Watson*, 2 Kee. 713; *Emdin* v. *Darley*, 1 N. R. 22.

(*n*) *Quested* v. *Collis*, 10 M. & W. 18. This case, though cited, was not followed in *Ross* v. *Buxton*, (1889) 42 C. D. 190, and since *Re Margetson and Jones*, (1897) 2 Ch. 314, it cannot, it is submitted, be relied on. Moreover, in all Courts since the Judicature Acts, as in the old Courts of equity, the judgment may be given in favour of the defendant for damages as well as for costs.

(*o*) *Griffin* v. *Eyles*, (1788) 1 H. Bl. 122.

held that a solicitor has not a lien on the judgment, but only on the *fruits* of the judgment, and that he has no *locus standi* in the proceedings after his retainer has ceased, but has a lien on the fund in Court which has been paid in as a security for the wife's costs (*p*).

Choice of remedies.

The particular remedy which it is best for the solicitor to select in any given case depends, of course, upon the nature of the fund or monies over which the lien is claimed. It can seldom be to his interest to try to proceed with an action which his client has attempted to compromise behind his back unless a judgment has been actually obtained, so that nothing remains but to enforce it by issuing execution or otherwise. Still cases *may* sometimes arise where it is to his interest to go on with an action, where, for instance, he can by clear evidence prove his client's case without the necessity of calling him as a witness, and especially where the action is on the very eve of trial; and we have therefore thought it well to cite those cases where the solicitor has been allowed to go on with his client's action, as well as those where other remedies have been given to him for the enforcing of his lien.

Costs of enforcing lien are added to security.

As to the costs of proceedings to enforce the solicitor's lien, the Court generally directs them to be added to his taxed bill of costs and paid out of the fund in Court if the lien is on that fund. In the case of a charging order, as we have seen, the costs of the application are taxed as between solicitor and client, and added to the amount of the lien, and paid out of the same fund, and the costs of an appeal are dealt with in the same way. In fact, the costs of the application and appeal (if any) are treated like mortgagees' costs in a redemption or foreclosure action; that is to say, they are added to, and form part of, the lien, and the lien is not considered as paid or satisfied until they are paid (*q*).

(*p*) *Parry* v. *Parry*, (1886) 30 Sol. Jo. 305.

(*q*) *Waterland* v. *Serle*, (1897) W. N., 163, App.; *Scholey* v. *Peck*, (1893)

Where the fund over which the lien is claimed is not in Court, but is in the hands of another person such as the client's adversary, or where the money has been paid to the client himself, the Court usually directs the party who is ordered to pay the lien to pay the costs of the application out of his own pocket, like any other unsuccessful litigant (*r*).

or directed to be paid by adversary.

In one case before the late Lord Justice James (*s*) he only gave to the solicitor who had successfully asserted his lien his costs out of pocket of the application, he having acted in person instead of by another solicitor, but it is submitted that at the present day the solicitor would be allowed his full costs just as if he had acted for a client, except that the taxing master would not of course allow him any charges for instructions (*t*).

Solicitor acting in person. Costs.

Although in the analogous case of a charging order the costs of the application are given as between solicitor and client, we do not find any case where that has been done where it was a case of lien on funds as distinct from a charging order. In most cases they have been given as between party and party only. Probably the reason of the difference is that a lien is not a charge or equitable mortgage, but merely a claim to the equitable interference of the Court; whereas a charging order when made is more than that, it being to all intents and purposes an equitable charge or mortgage possessing all or nearly all the incidents of an equitable mortgage, including the right to have the mortgagee's costs taxed as between solicitor and client (*u*).

1 Ch. 709, Romer, J.; *Re Hill*, (1886) 33 C. D. 266, App.; *Smith* v. *Winter*, (1869) 18 W. R. 447; see *London Scottish, &c., Society* v. *Chorley* (1884) 13 Q. B. D. 872, App.

(*r*) *Ross* v. *Buxton*, (1889) 42 C. D. 190, Stirling, J.; *Re Margetson and Jones*, (1897) 2 Ch. 314, Kekewich, J.; *Pelly* v. *Wathen*, (1850) 1 De G. M. & G. 16, L.JJ.

(*s*) *Smith* v. *Winter*, (1869) 18 W. R. 447.

(*t*) *London Scottish, &c.* v. *Chorley*, *ubi supra*.

(*u*) *Waterland* v. *Serle*, (1897) W. N. 163.

Importance of giving notice.

Although a notice of the solicitor's lien is not strictly a remedy, but merely a precautionary step before exercising a remedy, it may be convenient here to remind the practitioner of the importance of giving notice of the lien to any person who is about to compromise or pay any money to the client direct. In fact, the moment the solicitor suspects the *bona fides* of his client he ought to give notice of his lien to the opposite party and his solicitor. A suggested form of such notice will be found in Appendix I.

CHAPTER III.

LIEN ON DOCUMENTS.

SECT. I.

WHAT DOCUMENTS ARE SUBJECT TO THE LIEN AND THE EXCEPTIONS TO THE RULE.

Definition of "lien" on documents.

THIS lien is "a right to hold a piece of paper or parchment until the solicitor's costs are paid," according to a modern decision (*a*), and according to Lord St. Leonards (*b*), it is a right, to lock up the client's deeds in the solicitor's box, and to put the key into his pocket until the client satisfies his demand," but the lien is more than this, for its subject matter includes not only all written and printed documents, but also books, both written (*c*) and printed (*d*), plans, maps, models, samples, and the like.

Of course any artificer who has done work upon a chattel has a lien upon it or a right of retaining possession of it till the price of his work has been paid. Thus a law stationer has a lien upon a deed which he has ingrossed, but his lien is less extensive than that of a solicitor who has ingrossed a precisely similar deed, for the law stationer would have a special or particular lien only, whereas the solicitor would have a general lien. In other words, the stationer could not retain the deed after he had received the price for ingrossing that particular deed, whereas the solicitor could insist upon retaining

(*a*) *West of England Bank* v. *Batchelor*, (1882) 46 L. T. 132, Fry, J.
(*b*) *Blunden* v. *Desart*, 2 Dru. & Warr. 418.
(*c*) *Exp. Jabet*, (1860) 6 Jur. N. S. 387.
(*d*) *Friswell* v. *King*, 15 Sim. 191.

that deed until all costs owing by the same client in all other matters of business were paid. To put it shortly, the solicitor's lien is general (*e*), but the stationer's lien is only special.

Solicitor's lien is general. Other liens are usually special.

If a solicitor is also a town clerk or a steward of a manor, or holds other offices the duties of which could also be discharged by a person who is not a solicitor, he would have the solicitor's general lien upon all documents and papers that came into his hands in the capacity of solicitor to the corporation or lord of the manor for professional work done by him (*f*), but as to the documents which come into his hands in his capacity of town clerk or steward for work not required to be done by a solicitor, but which a non-professional town clerk or steward might have done, he would not have any general lien, though he might possibly have the special lien, like that of a law stationer on books and documents actually written by him.

The lien extends to all documents and other subjects of lien in the solicitor's possession.

Client's will exempt from lien.

There are some exceptions to this right of lien, the most notable being the will of the client. The origin of this exception is a decision of Lord Eldon in *Balch* v. *Symes* (1823) (*g*), and the reasons for the exception do not appear to rest upon any basis of sound reasoning, for they would equally support a contention that other documents which are admittedly subject to the lien should be likewise exempt from it. However, the exception is far too thoroughly established to be dependent upon logic for its existence.

Not only a will, but all testamentary papers, may be ordered by the Probate Division of the High Court to be

(*e*) *Exp. Nesbitt*, (1804) 2 Sch. & Lef. 279 ; *Blunden* v. *Desart*, 2 Dru. & Warr. 423 ; *Exp. Stirling*, (1808) 16 Ves. 258.

(*f*) *Rex* v. *Sankey*, (1836) 6 N. & M. 839 ; *Newington Local Board* v. *Eldridge*, (1879) 12 C. D. 349.

(*g*) Turn. & R. 92; see also *Georges* v. *Georges*, (1811) 18 Ves. 294. It has also been acted on in *Lord* v. *Wormleighton*, Jac. 581, and in *Exp. Law*, 2 A. & E. 45.

brought into the registry for the purpose of proving or opposing the probate of a will; and the solicitor's lien could not be invoked to prevent their being brought in (*h*).

Certain books and papers exempt from lien.

A solicitor can have no lien on such of the books of a joint stock company as are required by the Companies Acts or the articles of association to be kept at the registered offices of the company or on papers handed to him after the presentation of the petition even before the making of the winding-up order; but papers deposited with him before the winding-up petition, consisting, for instance, of applications for shares not required to be kept at the offices of the company, will be subject to his lien (*i*).

A solicitor to the official liquidator of a company has no lien on the file of proceedings or the documents relating thereto. See p. 88, *post*.

As to cases in bankruptcy see p. 87.

Lien does not prevent release from custody.

In the days of arrest for debt it was decided in several cases that a solicitor had no lien upon the body of his client (*k*), or on that of his client's adversary; and, now that arrest for debt has been confined within the narrowest limits by the Debtors Acts, 1869 and 1878, they are still useful to show that the solicitor cannot by virtue of his lien prevent the creditor from authorising the release of his debtor.

(*h*) Williams on Executors, Pt. I., Bk. IV., Ch. II., sec. 1.

(*i*) *Capital Fire Assurance Co.*, (1884) 24 C. D. 408, App. In *Atton* v. *Lastingham Railway*, (1905) March 3rd, Buckley, J. (not reported), a debenture-holder's right of inspection of a company's books under sect. 55 of the Companies Clauses Consolidation Act, 1845, was held to be paramount to the lien of a firm of accountants.

(*k*) *Camp* v. *Pote*, (1849) 8 C. B. 375; but see *Cox* v. *Pritchard*, (1851) 2 L. M. & P. 298, and other cases cited in Chitty's Archbold, 13th edit. p. 144.

Sect. II.

THE PERSONS ENTITLED TO THE BENEFIT OF THE LIEN.

Effect of change in partnership.

The solicitor himself is of course entitled to assert the lien even if he has retired from practice (*l*) or possibly if he has taken a partner (*m*), and so are all persons claiming through him as his privies, such as his executors, administrators, assigns, trustees in bankruptcy, and others (*n*); and even a particular assignee to whom the solicitor has transferred his bill of costs is entitled to the same lien as the solicitor himself (*o*).

Sect. III.

PERSONS AGAINST WHOM THE LIEN CAN BE ASSERTED.

The client and all parties claiming through him.

The persons liable to have the lien set up against them are the client and all persons claiming through him as his privies (*p*), for example his heir, executor, administrator, assign (including purchaser), mortgagee, the trustees of his marriage or other settlement (*q*), and even persons claiming under a power of appointment exercised by the client, whether the power is general or special, committee in lunacy (*r*), and others, *e.g.*, creditors of a deceased person whose estate, real or personal, is being administered by the Court (*s*). Trustees in bankruptcy too stand in no better position on the question of lien than the bankrupt, and therefore the solicitor has his lien against them also on all documents that came

(*l*) *Hope* v. *Liddell*, (1855) 7 De G. M. & G. 331.

(*m*) *Pelly* v. *Wathen*, (1850) 7 Ha. 351; but see *Re Forshaw*, 16 Sim. 121.

(*n*) *Gregory* v. *Cresswell*, (1845) 14 L. J. N. S. Chanc. 300.

(*o*) *Bull* v. *Faulkner*, (1848) 2 De G. & Sm. 772; *Westhead* v. *Riley*, (1883) 25 C. D. 413, and see p. 50, *ante*.

(*p*) *Ogle* v. *Story*, (1833) 1 N. & M. 474; *Hyde* v. *Wigmore*, Moz. 12.

(*q*) *Re Watson*, (1884) 50 L. T. 205; *Re Gregson*, (1858) 26 Beav. 87.

(*r*) *Re Davies*, (1843) 12 L. J. Ch. 456.

(*s*) *Warburton* v. *Edge*, (1839) 9 Sim. 508.

into his hands before the bankruptcy (*t*). In the case of bankruptcy, however, there are one or two statutory exceptions to the lien.

Bankruptcy.

By the Bankruptcy Rules of 1886, r. 349, it is provided that no person shall, as against the official receiver or trustee, be entitled to withhold possession of the books of account belonging to the debtor or to set up any lien thereon, but it has been decided that this rule is strictly limited to books of account (*u*) and cannot be extended to vouchers, correspondence, or even cheque books (which are *not* books of *account*), so that, with the single exception of books of account strictly so called, the solicitor's lien is in full force (*x*).

Another statutory exception will be found in the 27th section (sub-sect. 1) of the Bankruptcy Act, 1883, which enables the Court to summon and examine any person and to order him to produce any document.

This section interferes with lien to the extent (but to that extent only) of requiring production of the documents (*y*); it does not require the solicitor to deliver them up (*z*), and the Court can in its discretion refuse to order even production (*a*); but a solicitor employed by a trustee in bankruptcy has a lien upon all such documents as are the fruits of his own labour or expense (*b*).

Liquidator company.

A solicitor's lien cannot be set up against an application by the liquidator of a company for the production of documents without prejudice to the lien

(*t*) *Re Winslow, exp. Godfrey*, (1886) 16 Q. B. D. 697, Cave, J.; *Re Jones and Roberts*, (1905) April 15, App.

(*u*) *Re Winslow, ubi supra.*

(*x*) A *bonâ fide* purchaser of the books of his partner will not be required to hand them over to that partner's trustee in bankruptcy: *Re West, exp. Good*, (1882) 21 C. D. 868; *Re White & Co., exp. Official Receiver*, 1 Mor. 77.

(*y*) *Re Toleman, exp. Bramble*, (1880) 13 C. D. 885, Bacon, C.J.

(*z*) *Re Moss*, (1866) L. R. 2 Eq. 345.

(*a*) *Exp. Tatton, re Thorp*, (1881) 17 C. D. 512, App.

(*b*) *Exp. Yalden, re Austin*, (1877) 4 C. D. 129.

for costs (*c*). The solicitor to a liquidator has no lien on the file of proceedings nor on the documents relating thereto (*d*).

Solicitor acting for successive clients.

A solicitor for a purchaser from a former client has a lien against the purchaser for all his costs due from both clients provided the latter at the time of his purchase has notice of the lien. Thus where a solicitor took proceedings for A. and afterwards continued them for B., to whom A. had transferred all his rights with notice of the solicitor's lien, it was held that the solicitor had a lien as against B. for the whole of his costs from the beginning (*e*).

Ireland "salvage" costs.

In Ireland it is or was the practice to give a solicitor a lien for costs termed "salvage costs" in many cases where he would not be allowed a lien by English law (*f*). In such cases a solicitor who acted for a tenant in tail has been allowed to retain title-deeds as against the remainderman where meritorious services have been rendered by the tenant in tail's solicitor which resulted in a benefit to the remainderman; but they do not appear of any practical value to English practitioners, at all events since the passing of the Solicitors Act, 1860, enabling the Court to make a charging order against any kind of property, including real estate.

No lien against persons claiming by title paramount

But although the lien can be set up against the client and all persons claiming through him, it cannot be asserted against persons claiming by title paramount adversely to, or in common with, the client.

The solicitor for an unsuccessful defendant in an action of ejectment cannot retain the title-deeds by virtue of his

(*c*) *South Essex Estuary Co., exp. Paine and Layton*, (1868) L. R. 4 Ch. 215, App.

(*d*) *Union Cement and Brick Co., exp. Pullbrook*, (1868) L. R. 4 Ch. 627, App.; but Mr. Emden, in his book on winding up (7th edit. p. 284) is of opinion that this case does not apply to a voluntary winding-up, but only to a compulsory liquidation.

(*e*) *General Share Trust Co.* v. *Chapman*, (1875) 1 C. P. D. 771.

(*f*) See Irish cases cited in Stokes on Lien, pp. 18—20. His book is, however, over 40 years old.

lien as against the successful plaintiff (*g*). A solicitor for a residuary devisee in an action for administration has no lien on the title-deeds for his costs, for his client's rights are subject to the prior claims of the creditors and legatees charged on the land (*h*).

Where a breach of trust has been committed by trustees lending money upon an unauthorised security the *cestuis que trustent* have a lien upon that security to the extent of making good the trust fund, and this lien is paramount to the lien of the trustee's solicitor, who cannot stand in a better position than his client the trustee, and cannot therefore retain the title-deeds relating to the unauthorised security for his costs ; and the fact that the beneficiaries have been benefited by the solicitor's services for which the costs are charged makes no difference (*i*).

Of course, a mortgagor's solicitor cannot as against the mortgagee set up his lien on a title-deed relating to the property mortgaged if it came into his possession after the creation of the mortgage, nor can he if the property mortgaged be of leasehold tenure obtain a renewal of the lease and claim a lien upon the new lease as against the mortgagee ; for as between the mortgagor and the mortgagee the latter is entitled to the new lease, and the solicitor cannot have any better right to it than his own client, the mortgagor (*k*). See p. 91, *post*.

The doctrine that a solicitor's lien cannot be set up as against persons who have a better right to the documents than the client has been established by several modern cases arising out of mortgage transactions. In *Pelly* v. *Wathen* (*l*) the circumstances were briefly as follows :—

Pelly v. *Wathen*, (1850).

A purchaser of property which was subject to a mortgage created a second mortgage before the completion of the

(*g*) *Simms* v. *Blake*, 4 Dowl. 263 ; *Exp. Nesbitt*, (1804) 2 Sch. & L. 279.

(*h*) *Marsh* v. *Bathoe*, Ridg. temp. Hardw. 256. Cf. *Re Hawkes*, (1898) 2 Ch. 1.

(*i*) *Francis* v. *Francis*, 5 D. M. & G. 108.

(*k*) *Smith* v. *Chichester*, 2 Dru. & W. 393, Sugden, C.

(*l*) 1 De G. M. & G. 16, L.JJ.

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purchase. He afterwards created a third mortgage, but the second mortgagee's conduct was such as to give the third mortgage priority over his. Then the purchase was completed, the purchaser paying off the first mortgage and taking a conveyance to a trustee for himself. On this occasion the title-deeds were handed over to his solicitors, who afterwards took a transfer of the third mortgage. One of them was the trustee for the purchaser in the conveyance. The second mortgagee did not give them, nor had they, any notice of his security. It will be seen, therefore, that the rights of the various parties stood in the following order of priority, subject of course to the question of the priority of the solicitors' lien: (1) the third mortgage vested in the solicitors, (2) the second but postponed mortgage, (3) the solicitors' lien on the title-deeds for their costs, and (4) the purchaser's (the client's) equity of redemption. The solicitors sought in effect to tack their lien to their mortgage, so that their costs might rank prior to the second mortgage; but it was held both in the Court of first instance and on appeal that they could not do this, that their lien either for their general bill of costs or for their costs relating to the conveyance could not prevail against the second mortgagee, the rights of a solicitor in respect of his lien for his bill of costs being no greater than those of his client, and that the circumstances of the case did not exempt it from the scope of this rule. It will be noticed that in this case the second mortgagee's title was only equitable, that the legal estate was vested in one of the members of the firm of solicitors, and it also appears from both reports of the case that the solicitors obtained the deeds without notice of the second mortgage, but the Court declined to treat these circumstances as altering the rights of the parties in any way.

Notice not necessary,

Notice of the lien is not essential to give it validity (*m*),

(*m*) *West of England Bank* v. *Batchelor*, (1882) 46 L. T. 132, Fry, J.; see also *Lord* v. *Colvin*, (1862) 2 Dr. & Sm. 82; *Day* v. *Day*, (1857) 26 L. J. Ch. 585, App.

nor, on the other hand, is any priority over other assignments or incumbrances gained by giving such notice. The well-known rule in *Dearle* v. *Hall* (*n*) that priority of notice gives priority of charge as regards funds in the hands of trustees does not apply to a solicitor's lien on documents.

and absence of notice not prejudicial.

Where the same solicitor acts for both mortgagee and mortgagor he cannot claim a lien on the title-deeds for costs due to him from the mortgagor. The previous cases to the contrary are no longer law. A solicitor for a mortgagee cannot after payment off by the mortgagor of all principal, interest, and costs retain the deeds for costs due by the mortgagor to the solicitor (*o*). See p. 89, *ante*.

Different clients with conflicting interests.

If an intending mortgagee instructs his own solicitors, who are not also acting for the intending mortgagor, to investigate the title and advise him on the proposed security, and the negotiations for a mortgage fall through, the solicitors have no lien for their costs as against the intending mortgagor, even if the latter undertook with the intending mortgagee to pay the solicitors' costs; but if the solicitors had acted for both parties they would doubtless have a lien (*p*).

Lien in cases of mortgage.

A mortgagee's solicitor has a lien on the mortgage and other title-deeds as against the mortgagor as well as the mortgagee to the extent of the amount due from the mortgagor for principal, interest, and mortgagee's costs, and when this amount has been paid off the lien comes to an end, for the mortgagee's solicitor can, of course, have no longer any right to retain the deeds when his client the mortgagee has ceased to have such right (*q*).

(*n*) 3 Russ. 1.

(*o*) *Re Snell*, (1877) 6 C. D. 105, Jessel, M.R.; *Re Mason and Taylor*, (1879) 10 C. D. 729; *Exp. Fuller*, (1881) 16 C. D. 617, Bacon, C.J.; *Exp. Quin*, (1884) 49 L. T. 811, Bacon, C.J.; *Re Llewellin*, (1891) 3 Ch. 145, Chitty, J. In *Re Walker*, (1893) 68 L. T. 517, Kekewich, J., the circumstances were peculiar; *Sheffield* v. *Eden*, (1879) 10 C. D. 291, App.; *Re Moseley*, (1867) 15 W. R. 975.

(*p*) *Pratt* v. *Vizard*, 5 B. & Ad. 808, K. B.

(*q*) *Hollis* v. *Claridge*, (1812) 4 Taunt. 807; *Solly* v. *Rathbone*, 2 M. & S. 298; *Wakefield* v. *Newbon*, 6 Q. B. 276; *Francis* v. *Francis*, 2 D. M. & G. 73.

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Escrow.

Where a conveyance was prepared by a purchaser, and therefore the piece of parchment was his property, and the vendor executed it as an escrow, and delivered it to his solicitor, to be handed over to the purchaser on payment of the residue of the purchase-money, and the sale was afterwards rescinded, it was held that the vendor's solicitor had no lien on the escrow for the costs due to him from his client the vendor, although the client had himself a lien upon it for his unpaid purchase-money (*r*). This doctrine seems harsh towards the solicitor, but there is no reason to doubt the correctness of the decision, which is cited without disapprobation by such eminent authors as Lord St. Leonards and Mr. Dart (*s*).

Joint property.

No lien can be claimed on documents unless they are the client's *exclusive* property. For instance, if a solicitor acts for one joint tenant or tenant in common, he cannot retain the deeds as against the other joint tenant or tenant in common (*t*).

Lien ceases when client's right ceases.

When the client's right to the documents has determined his solicitor's lien comes to an end likewise. The most familiar example of this is when a tenant for life dies. In that event the solicitor cannot retain the deeds as against the remainderman (*u*), even if the costs forming the subject of the solicitor's lien were for meritorious services rendered by the solicitor which benefited the remainderman as well as the tenant for life, such as clearing off incumbrances, getting tenants to take new leases at increased rents, and the like. Of course, if the solicitor had attained these results by proceedings in Court, and any property could have been said to be recovered or preserved within the meaning of the 28th section of the Solicitors Act,

(*r*) *Esdaile* v. *Oxenham*, (1824) 3 B. & C. 225 ; *Oxenham* v. *Esdaile*, 3 Y. & J. 262.

(*s*) *Lord St. Leonards*, V. & P. 14th edit. 564 ; Dart. V. & P. 6th edit. 638, 826.

(*t*) *Molesworth* v. *Robbins*, 2 Jo. & L. 358, Sugden, C.

(*u*) *Exp. Nesbitt*, (1804) 2 Sc. & Lef. 279, Redesdale, C. ; *Lightfoot* v. *Keane*, (1836) 1 M. & W. 745.

1860, the solicitor could get a charging order (see *ante*, pp. 17 to 24), but he could not detain the deeds unless the charging order by converting him into an incumbrancer gave him that right as incumbrancer, but not as solicitor.

Borrowing deeds.

If a tenant for life's solicitor borrows deeds from the trustee he cannot set up a lien on them for costs due to him from the tenant for life (*x*).

Marriage settlement—no lien usually.

A solicitor preparing a marriage settlement, even if he acts for the wife, looks to the intended husband for payment, that being the usual custom in the absence of an agreement to the contrary; the only remedy, therefore, for his costs is his personal one against the husband. He cannot retain the settlement or the title-deeds of the trust property settled as against the trustees of the settlement unless he expressly asserts his lien before the settlement is executed (*y*).

Trustee solicitor.

A trustee who is a solicitor is not entitled to a lien on deeds for his general costs if they came into his hands as trustee and not as solicitor (*z*), but he would of course have the usual trustee's lien on the trust estate (which includes all deeds and papers) for any costs, charges, and expenses properly incurred by him in the execution of the trusts. These costs may have been paid by him to another solicitor, or they may be payable to himself, if they consist of payments out of pocket, or, even if they are his own professional charges, so long as he was authorised by the terms of his trust to charge them (*a*).

When voidable deed is set aside, lien is gone.

Where an action is brought to set aside a deed a solicitor who has a lien upon it cannot refuse to produce it by reason of his lien; nor, if the action succeeds, can

(*x*) *Re Mayhew*, (1859) 7 W. R. 351.

(*y*) *Re Lawrance-Bowker* v. *Austin*, (1894) 1 Ch. 556, Kekewich, J. Where the husband's solvency is doubtful, the safer course is to provide in the settlement itself that the trustees shall in the first place pay the costs of preparing it out of the capital of the trust property.

(*z*) *Re Gough*, (1894) 70 L. T. 726, North, J.

(*a*) *Harbin* v. *Darby*, (1860) 28 Beav. 325.

he prevent the deed from being cancelled if the Court directs this to be done (*b*).

The solicitor's lien cannot prevent the Inland Revenue Commissioners from inspecting deeds and other property. Finance Act, 1894, sec. 7 (8).

Sect. IV.

FOR WHAT DEBTS OR CLAIMS THE LIEN ON DOCUMENTS CAN BE ASSERTED.

We have seen (*ante*, p. 84) that this lien is general (*c*), unless there has been a special agreement to the contrary.

Lien extends to all professional costs,

It extends to all professional charges and disbursements remaining unpaid after giving credit for all payments and just allowances.

and to costs of action to recover them.

The lien also, like a charging order, extends to the solicitor's costs of any action or proceeding brought for the recovery of the costs (*d*), (*ante*, p. 27). It also extends to the costs of taxation under the Solicitors Acts (*e*).

Interest on costs.

Formerly it did not extend to interest on the costs (*f*), but now that a solicitor is entitled to claim interest on disbursements in some cases and on profit charges as well in others, it is apprehended that the lien would extend to interest where the taxing master considers that interest ought to be allowed (*g*).

Does not extend to other debts.

The lien does not however extend to any other general debts, such as money lent to, or money paid for, the client,

(*b*) *Balch* v. *Symes*, (1823) T. & R. 92, Eldon, C.

(*c*) *Turner* v. *Deane*, (1849) 3 Ex. 839, Parke, B.; *Blunden* v. *Desart*, 2 Dru. & W. 423, Sugden, C.; *Exp. Stirling*, (1808) 16 Ves. 258, Eldon, C.

(*d*) *Lambert* v. *Buckmaster*, (1824) 2 B. & C. 618, Abbott, C.J.; *Gray* v. *Graham*, (1855) 26 L. T. 111, H. L.

(*e*) See Forms of Order to Tax, Annual Practice, 1905, vol. ii. pp. 138 and 139.

(*f*) *Robarts* v. *Jefferys*, 8 L. J. O. S. 140.

(*g*) Attorneys and Solicitors Act, 1870, s. 17, and General Order under Solicitors' Remuneration Act, 1881, r. 7.

but only to professional charges and disbursements (*h*). So strictly indeed has this rule been insisted on that where a solicitor for a railway company (*i*) claimed a lien on its papers for obtaining its Act of incorporation, and which Act contained the usual section directing that all the costs of obtaining the Act should be paid by the company, it was held that he had no lien. The reasoning by which this decision was arrived at was as follows: but for that section of the Act he would have had no claim against the company for obtaining the Act of incorporation, for the company had no existence until it was incorporated by the royal assent being given to the Act, but this section gave him the right to sue the company on an implied *assumpsit* (*k*), and as he could only sue in that way and could not sue on his bill of costs in the ordinary action for work done, his claim was a general debt to which his lien did not extend, but of course he had the usual lien for so much of his bill of costs as represented work done after the incorporation of the company.

No lien for money lent or paid.

It would seem just that if a solicitor out of his own monies pays off a lien of his client's former solicitor, and thus obtains possession of his client's deeds, he ought to have either a lien upon them for the amount so paid, or at all events he ought to be subrogated to the rights of the former solicitor and allowed to stand in his place with respect to the lien, but according to the authorities his lien on the deeds so obtained does not extend to the amount so paid (*l*), though of course it extends to his

(*h*) *Re Hanbury, Whitting, and Nicholson*, (1896) 75 L. T. 449, Stirling, J.; *Re Taylor & Co.*, (1891) 1 Ch. 590, App.; *Re Anglo-Maltese Co.* (1885) 33 W. R. 652, Kay, J.; *Bissill* v. *Bradford Tramways*, (1894) 9 Times Rep. 337, Kekewich, J.

(*i*) *Re Galland*, (1886) 31 C. D. 296, App.

(*k*) *Tilson* v. *Warwick Gas-light Co.*, 4 B. & C. 962, and *Wyatt* v. *Metropolitan Board of Works*, 11 C. B. N. S. 744, are the leading authorities on this point, though they were not cited in *Re Galland*.

(*l*) *Irving* v. *Viana*, (1842) 2 Y. & J. 70; 2 Ha. 184; *Christian* v. *Field*, (1842) 2 Ha. 177; *Gibson* v. *May*, 4 D. M. & G. 512. As to subrogation, see p. 74, *ante*, note (*m*).

own costs (*m*); and it appears that the only way in which he could obtain such a right would be to take an express assignment of the former solicitor's costs and lien, which would of course be valid (see p. 86, *ante*). The solicitor paying the money could not claim from his client more than he actually paid. If, for example, he bought up the former solicitor's bill for ten shillings in the pound, he could not charge his client twenty shillings in the pound; but he could claim what he paid, and possibly interest at 4 per cent., like the case of a trustee buying up from a creditor a debt due by his *cestui que trust* (*n*).

unless assignment taken.

Where all or part of the solicitor's bill of costs is for services rendered in an action or other proceeding the lien extends to costs as between solicitor and client, and not merely to costs as between party and party. The form of the usual order to deliver up after taxation clearly shows this (*o*).

Lien extends to extra costs as between solicitor and client.

Where the common order to tax a bill owing by several persons has been made containing the usual direction to give up all deeds and papers after payment of what shall be found due on taxation, the solicitor must give up all the deeds and papers on payment of the costs due to him by the clients jointly; he cannot retain them for costs due to him by each of the clients separately unless it is so expressed in the order (*p*).

Several clients owing distinct costs.

A solicitor has no lien for his charges for business which the Court holds ought never to have been done, *e.g.*, if this business consists of preparing a deed which the Court has directed to be set aside for undue influence (*q*), or where the solicitor was instructed by the directors of a joint stock company to do certain business

No lien for illegal work.

(*m*) *Stevenson* v. *Blacklock*, (1813) 1 Mau. & Sel. 535.

(*n*) Lewin on Trusts, 11th edit. ch. xiii. sect. 3, p. 304, and cases there cited.

(*o*) Annual Practice, 1905, vol. ii. pp. 138 and 139.

(*p*) *Re Chatterton*, (1881) 26 Sol. Jo. 59, App.

(*q*) *Huguenin* v. *Basely*, (1807) 14 Ves. 301.

not authorised by the deed of settlement or which was otherwise *ultra vires* (*r*).

Effect of sale by client subject to lien.

If a solicitor has a lien on his client's deeds in his possession, and while they are in his possession the client mortgages or sells the property to which the deeds relate, and the purchaser chooses to leave the deeds in the hands of the solicitor, and the solicitor has a claim for costs, some of which were incurred before and some after the sale or mortgage, the solicitor's lien as against the purchaser or mortgagee will be limited to the costs incurred *before* the sale or mortgage, unless the subsequent costs were incurred for the benefit of the purchaser or mortgagee and with his concurrence, but in this latter case the lien will be limited to the costs incurred for the benefit of the mortgagee, and will not extend to the solicitor's costs in all matters of the mortgagor or vendor (*s*).

If, however, a purchaser or mortgagee has been guilty of gross negligence in leaving the title-deeds in the hands of a seller or mortgagor, and the latter's solicitor has had no notice of the sale or mortgage, he will have a lien for his general costs, just as if no sale or mortgage had taken place (*t*). The grounds of this doctrine do not appear very obvious, for it seems to place a solicitor in the position of a puisne incumbrancer, which he certainly is not (see p. 89 to 91, *ante*). Probably it is based upon a sort of equitable estoppel (*u*).

Notice neither helps nor hurts lien.

As a lien on documents is not an incumbrance, like a mortgage, or even like a lien on funds, it makes no difference to the rights of the parties whether the purchaser or mortgagee had notice of the solicitor's lien or alleged lien; and conversely it is not material whether

(*r*) *Re Phœnix Life Assurance Co.*, (1863) 1 H. & M. 433, Wood, V.-C.

(*s*) *Blunden* v. *Desart*, 2 Dru. & W. 420, Lord St. Leonards; *Watson* v. *Lyon*, (1855) 7 D. M. & G. 295; *Young* v. *English*, 7 Beav. 10, Langdale, M.R.

(*t*) *Bernard* v. *Drought*, 1 Molloy, 38, Sir A. Hart.

(*u*) See *Northern Counties Insurance Co.* v. *Whipp*, (1884) 26 C. D. 482, App., which seems inconsistent with the doctrine mentioned above.

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the solicitor had or had not notice of the sale, mortgage, or other like transaction (*x*).

Effect of administration judgment.

The fact that an estate is being administered by the Court in an action instituted by a creditor, even if the estate is insolvent, does not prejudice the lien of the executor's solicitor on the documents relating to the estate to secure the costs not only of the executor's defence to the action and other costs incurred therein, but also for other business done for the executor in his representative character (*y*). The general creditors of a deceased person can only take the estate as they find it. Of course, the lien, as we have mentioned before (p. 94, *ante*), will be strictly limited to professional charges and disbursements, and will not extend to monies paid by the solicitor by way of compromise nor to monies paid by him to another solicitor in discharge of the latter's lien (*z*).

Solicitors of trustee in bankruptcy.

Where the solicitors of a trustee in bankruptcy have been changed they have a lien upon documents upon which they have expended their labour and money (*a*), but under an express rule they have no lien on the bankrupt's books (*ante*, p. 87).

Act of bankruptcy.

A solicitor who has been instrumental in assisting his client in the preparation of deeds which are afterwards held to be acts of bankruptcy has not as against the trustee in bankruptcy a lien on the client's deeds for such of his costs as were incurred after the acts (*b*).

(*x*) *Blunden* v. *Desart*, *ubi supra*; also cases cited on p. 90, *ante*.

(*y*) *Warburton* v. *Edge*, (1839) 9 Sim. 508.

(*z*) *Christian* v. *Field*, (1842) 2 Ha. 177; *Exp. White*, (1841) 2 M. D. & De G. 436

(*a*) *Re Austin, exp. Yalden*, (1877) 4 C. D. 129, App., but not on the file of proceedings; *exp. Hardy*, 1 Rose 395; *exp. Titley*, 2 Rose 83.

(*b*) *Re Clendinning*, 23 L. T. O. S. 347.

Sect. V.

VARIOUS PROCEEDINGS.

Where the lien is not disputed it rarely happens that any legal proceedings are necessary, because, so far as the solicitor is concerned, his lien is merely passive and inert; and, as regards the client, he cannot as a general rule obtain possession of his documents without paying to the solicitor the amount for which he has a lien.

Lien passive only, no right to realise.

The solicitor's lien is passive. He has merely "a right to hold a piece of paper or parchment until his costs are paid" (*c*), or, in the vigorous language of Lord St. Leonards, "the right to lock up the documents in his box and to put the key into his pocket, until his client satisfies the amount of his demand" (*ante*, p. 83). He has no such right as an equitable mortgagee has of enforcing payment of the amount due by sale, foreclosure, or other means of realisation.

Trover, detinue, or mandatory injunction by solicitor.

If a solicitor is wrongfully deprived of documents on which he has a lien, he can bring an action of trover or detinue for the recovery of possession of them (*d*), or he can under certain circumstances bring an action for their recovery in the Chancery Division and move the Court for a mandatory injunction to obtain possession of them without waiting till the trial (*e*).

Or against him.

On the other hand, if a solicitor refuses to give up the documents after his lien on them is paid or satisfied, the client can bring an action of trover or detinue against the solicitor (*f*). These remedies, however, are rarely resorted to, because the client has the simpler and cheaper remedy of obtaining an order in the matter of the solicitor directing him to deliver up the documents upon oath if required. This order can be obtained in

(*c*) *West of England Bank* v. *Batchelor*, (1882) 46 L. T. 132, Fry, J.
(*d*) *Dicas* v. *Stockley*, 7 Car. & P. 591, Littledale, J.
(*e*) *Whitmore* v. *Moss*, (1895) (not reported).
(*f*) *Bray* v. *Hine*, 6 Price, 203.

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the Chancery Division *ex parte* on a petition of course or in the King's Bench Division on a summons in chambers.

Usual order for delivery of papers.

The common order to tax (*g*) contains a provision that upon payment of what shall be found due to the solicitor he shall deliver up all the documents in his possession or power; but this direction must be omitted where other business is still pending, and further costs are being incurred (*h*), and of course the client by obtaining this order waives his right to object to any item as being barred by the Statute of Limitations.

Where client has discharged solicitor.

Unless the solicitor has discharged himself, the Court will refuse to order the solicitor to deliver up, or even to produce, furnish copies of, or allow copies to be taken of, documents upon which he has a lien, unless the papers are urgently required; and even then the Court will order delivery up only on the terms of the client paying into Court a sum sufficient to cover the amount claimed to be due in respect of the lien, together with the costs of taxation, and the client's new solicitor will be required to give an undertaking to return the papers if more than the amount deposited is found to be due on taxation, and also an undertaking to produce them on the taxation, and to permit the solicitor claiming the lien to have access to them at all times for the purpose of taxation or for the purpose of any action which he may bring for the recovery of the amount due, unless, of course, the order to tax contains the usual direction that no action shall be brought against the client pending the reference (*i*).

Town agent.

Of course, no action can be brought against a town agent to recover possession of a document on which the country solicitor has a lien (*k*).

We shall see, however (*post*, p. 106), that a solicitor

(*g*) Annual Practice, 1905, vol. ii. pp. 138 and 139.

(*h*) *Exp. Jarman*, (1877) 4 C. D. 835.

(*i*) *Re Galland*, (1886) 31 C. D. 296, App.; *Re Hanbury*, (1896) 75 L. T. 449, Stirling, J.; *re Foster*, (1904) 116 L. T. Jo. 388, Eady, J.

(*k*) *Watson* v. *Lyon*, (1855) 7 D. M. & G. 288.

will not be allowed to embarrass the prosecution of a suit for administration, partition, or the like, in which third parties—*i.e.*, persons other than his client—are interested, by his claim of lien, and that even if he has been discharged by the plaintiff he will be required to hand over all necessary papers to the solicitor who succeeds him in the conduct of the cause under certain reasonable safeguards for his protection.

Different rule in actions for administration, partition, and the like.

A question often arises in the course of an action between other persons whether a solicitor can decline to produce a document upon which he has a lien for the purpose of discovery or evidence at the trial or for enabling the Court to carry out a sale of property. The following are the rules dealing with those questions:—

Production of document on subpœna or under order for discovery.

A litigant, whether plaintiff or defendant, cannot resist discovery or production of a document on the ground that his former or present solicitor has a lien on it, but the Court will give the litigant liberty to apply, so that the order for discovery may not be made an instrument of oppression. It is no longer necessary, as in the older cases, to impose a condition that his adversary shall not issue an attachment without the leave of the Court, because since the Judicature Act an attachment can never issue without such leave (*l*).

With regard to producing the document under a subpœna duces tecum served upon the solicitor, the liability of the latter to produce it depends upon whether the party serving the subpœna is the client, a person claiming through the client, or a stranger. In the two former cases the solicitor ought not to be ordered to produce the document on which he has a lien unless the amount of the lien is deposited in Court (*m*); but this rule does not appear to have been uniformly adhered to, for in some cases the solicitor has been ordered to produce a

(*l*) *Vale* v. *Oppert*, (1874) 10 Ch. App. 340; *Lewis* v. *Powell*, (1897) 1 Ch. 678, Stirling, J.

(*m*) *Newington Local Board* v. *Eldridge*, (1879) 12 C. D. 349.

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deed upon which he had a lien (*n*). If the Court refuses to order production, secondary evidence may be given of the contents of the document (*o*). Where a solicitor attends on subpœna he should refuse to produce the document by reason of his lien, but if his objection is overruled, the Court will compel the production.

If, however, the party issuing the subpœna is neither the client nor a person claiming through the client, the solicitor cannot resist production on the ground of his lien (*p*), and if he refuses he will be liable to pay all the costs occasioned thereby, and also to be committed for contempt of Court. If he fears that the deed may be abstracted the Judge at *nisi prius* will allow him to stand by the witness while the latter is being examined respecting it (*q*).

Delivery up of papers on payment into Court.

By Order L. r. 8 of the rules issued under the Judicature Acts, it is provided that in the cases therein mentioned the Court or a Judge may order that the party claiming to recover property subject to a claim of lien be at liberty to pay into Court to abide the event of the action the amount of money for which the lien is claimed, and such further sum (if any) for interest and costs as such Court or Judge may direct, and that upon such payment into Court being made the property claimed be given up to the party claiming it (*qq*).

It is doubtful whether this rule enables the Court in any case to order a solicitor to deliver up papers, on which he claims a lien, on payment into Court of a sufficient sum to secure him. The point was raised, but not decided, in

(*n*) *Exp. Bramble, re Tolman*, (1880) 13 C. D. 885, Bacon, C., Judge, but this was a case in bankruptcy; *Fowler* v. *Fowler*, (1881) 44 L. T. 799, Kay, J.; *Re Hawkes*, (1898) 2 Ch. 1, App.; *Re Chatterton*, 26 Sol. Jo. 59.

(*o*) *Doe* d. *Gilbert* v. *Ross*, (1840) 7 M. & W. 102; but see *Attorney-General* v. *Ash*, 10 Ir. Ch. 327.

(*p*) *Hope* v. *Liddell*, (1855) 7 D. M. & G. 331; *Re Cameron's Coalbrook Ry. Co.*, (1857) 25 Beav. 1, Romilly, M.R.; *Ley* v. *Barlow*, 1 Ex. 800. See also *Vale* v. *Oppert*, (1874) 10 Ch. App. 340, James, L.J.

(*q*) *Thompson* v. *Moseley*, 5 C. & P. 501, Lyndhurst, L.C.J.

(*qq*) See Ann. Pr., 1905, p. 703, for full text of rule.

a leading case, but the question is more academic than practical, because we have seen that the Court has power independently of this rule to make a similar order when the interests of justice require it (*ante*, p. 100) (*r*).

Lien cannot prevent drawing up of judgment or order.

A solicitor cannot by reason of his lien prevent a judgment or order of the Court from being drawn up, completed, or corrected, even though he has been discharged by his client (*s*). He will be required to attend before the registrar and produce all necessary papers to enable the judgment or order to be drawn up without prejudice to his lien, the papers and order will be returned to him, and he will be allowed the costs of his attendance. If he refuses to take these steps he can be compelled on motion to do so and to pay the costs of the motion.

Production in other cases.

In an administration action where the creditors of the deceased are ordered to be paid their debts out of the fund in Court, the solicitor for the plaintiff or other person having the conduct of such order is, upon being paid his fee for attendance, bound to produce the order and certificate to the Paymaster-General, to enable the creditors to receive their debts (*t*).

When an action is brought to set aside a deed the plaintiff is entitled to have it produced under an order for discovery notwithstanding any lien that the defendant may set up (*u*).

Protection of lien by marshalling assets.

Where several estates of the client are ordered to be sold the Court will protect the solicitor's lien, and marshal the assets so as to throw a prior incumbrancer upon that estate of which the title-deeds are not subject to the solicitor's lien (*x*).

In bankruptcy, if a solicitor proves as a creditor, he

(*r*) *Re Galland*, (1886) 31 C. D. 296, App.

(*s*) *Bird* v. *Heath*, 12 Jur. 861 ; *Clifford* v. *Turrill*, (1848) 2 De G. & Sm. 1 ; *Simmonds* v. *Great Eastern Railway*, (1868) L. R. 3 Ch. 797, App.

(*t*) *Shortley* v. *Selby*, (1821) 5 Madd. 448 ; *Lechmere* v. *Brazier*, (1826) 1 Russ. 72.

(*u*) *Balch* v. *Symes*, (1823) T. & R. 92 ; *Beckford* v. *Wildman*, (1809) 16 Ves. 438.

(*x*) *Blunden* v. *Desart*, 2 Dru. & W. 424, Lord St. Leonards.

Proof in bankruptcy or administration actions abandons lien unless lien valued and deducted.

will abandon his lien unless he sets a value on it and deducts that value from the amount of his proof (*y*), unless the Court on application is satisfied that it was through inadvertence that he omitted to deduct the value of the lien. The same rules apply to an administration action where the estate is insolvent (*z*).

Costs of litigation.

Where an action is brought to ascertain the conflicting claims to priority of a solicitor's lien and the charge of an incumbrancer the costs will follow the event in the absence of special circumstances (*a*).

Hitherto we have been dealing with cases where the solicitor has not discharged himself, but where he has done so his lien is nearly gone, for it is so circumscribed and attenuated that it can hardly be said to exist so far as practical utility is concerned.

Where solicitor discharges himself his lien is lost except to a trifling extent.

A solicitor is deemed to have discharged himself when he refuses to proceed with his client's case, and this refusal can be either expressed or implied. He impliedly refuses to proceed if he tells his client that he cannot proceed unless funds are provided for counsel's fees or other disbursements or until a dispute between him and his client has been settled (*b*). So also he impliedly refuses if he is imprisoned even for a civil cause, such as attachment (*c*), and if he assigns the client's business to another solicitor, even though he is willing to continue to superintend the proceedings (*d*) ; so, too, if the solicitor absconds or is guilty of grave professional misconduct (*e*).

(*y*) Bankruptcy Act, 1883, Sched. I. r. 10 ; *Re Safety Explosives Co., Limited*, (1904) 1 Ch. 226. The cases in bankruptcy show that this excuse of inadvertence is rarely accepted. See, however, *Re Fanshawe, exp. Le Marchant*, (1905) 92 L. T. 33, Bigham, J., and cases there cited.

(*z*) Judicature Act, 1875, s. 10.

(*a*) *Pelly* v. *Wathen*, (1850) 7 Ha. 351.

(*b*) *Robins* v. *Goldingham*, L. R. (1872) 13 Eq. 440, Malins, V.-C. ; *Re E. D. Lewis*, 26 Sol. J. 361.

(*c*) *Scott* v. *Fenning*, (1845) 15 L. J. Ch. 88 ; *Re Williams*. (1860) 6 Jur. N. S. 108.

(*d*) *Colegrave* v. *Manley*, (1823) T. & R. 400.

(*e*) *Molloy* v. *Kilby*, (1881) 25 Sol. Jo. 317.

It was at one time considered that a solicitor was not entitled to demand payment of more than his out-of-pocket expenses until the action was finished, and that would still be the case with ordinary actions which are completed in a year or two, but in some actions in the Chancery Division, which last for many years, that rule would be unreasonable, and it is now settled law that there are certain convenient stages or breaks in such actions at which the solicitor can send in his bill and require payment and even sue in default of payment (*f*); but, of course, if the client does not pay, and the solicitor, as he lawfully may, refuses to proceed any further without such payment, he discharges himself; and so, too, does he if he refuses to go on with the action unless the client pays his costs in another matter, for the two matters ought to be kept distinct in this respect (*g*).

Solicitors also discharge themselves if one of the firm retires, for the client by employing a firm bargains for the services of *all* the members of the firm; indeed, it is quite possible that the very partner that has retired is the one in whom the client placed the most confidence. Immediately on retirement the retainer is gone, and the client may either continue to employ the continuing partners or employ a fresh solicitor; but even in the former case the employment is in point of law a new retainer (*h*).

Assuming that the solicitor has discharged himself, he must deliver up to the new solicitor the papers necessary for continuing the action, the new solicitor undertaking to hold them without prejudice to the former solicitor's lien, to return them undefaced within a few days after the conclusion of the action, and to allow the former solicitor access to them for the purpose of carrying on an action for his costs or making out or taxing such costs (*i*).

(*f*) *Re Romer and Haslam*, (1893) 2 Q. B. 286, App.
(*g*) *Heslop* v. *Metcalfe*, (1838) 3 My. & Cr. 183.
(*h*) *Griffiths* v. *Griffiths*, (1842) 2 Ha. 587.
(*i*) *Robins* v. *Goldingham*, (1872) L. R. 13 Eq. 440, Malins, V.-C.

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There are a few important exceptions to the rule that when a solicitor has been discharged by the client the latter cannot obtain possession of his papers without first paying the bill or in urgent cases paying the amount into court. The leading cases establishing this exception are *Belaney* v. *Ffrench* and *Re Hawkes* (*k*). They were both suits for administration. The plaintiff in the first case had discharged her solicitor and appointed another in his place. The first solicitor refused to part with any of the papers until his bill of costs was paid, and in consequence of this the new solicitor was unable to proceed with the suit. The Court held that a solicitor cannot embarrass a suit by keeping papers that belong to an estate that is being administered by the Court, and cannot use that means of obtaining payment, and the former solicitor was ordered to hand over the papers to his successor on terms. The principle laid down in this case is not confined to administration actions, but has been extended to partition actions and other actions in which other persons besides the plaintiff are interested, and to a debenture holder's action (*l*) in which a receiver was appointed (but not to the winding up of a company except to a very limited extent). Where an administration action is brought by an infant by his next friend, and a new next friend is appointed in his place, the solicitors for the first next friend must deliver up the papers to the solicitors of the new next friend. This rule is not followed in bankruptcy when the trustee changes his solicitors (*m*).

Belaney v. *Ffrench* (1874); *Re Hawkes* (1898).

Order made without prejudice to lien.

In all cases of this kind the former solicitor's lien is

(*k*) *Belaney* v. *Ffrench*, L. R. 8 Ch. 918 ; *re Hawkes*, (1898) 2 Ch., 1 App.

(*l*) *Boughton* v. *Boughton*, (1883) 23 C. D. 169, Fry, J. ; *Re Hutchinson*, (1886) 54 L. T. 842, North, J. ; *Boden* v *Hensby*, (1892) 1 Ch. 101, North, J. ; *Exp. Jarman*, (1876) 4 C. D. 835. See *Re Watson*, (1884) 50 L. T. 205, Pearson, J. ; *Capital Fire Insurance Co.*, (1883) 24 C. D. 408, App. ; *Batten* v. *Wedgwood, &c. Co.* (1885) 28 C. D. 317, Pearson, J. ; *Simmonds* v. *Great Eastern Railway*, (1868) L. R. 3 Ch. 797, App. ; *Re Hawkes*, (1898) 2 Ch. 1, App.

(*m*) *Re Austin, exp. Yalden*, (1877) 4 C. D. 129, App.

preserved so far as is consistent with the parting of the papers to the new solicitor for the special purpose of carrying on the action or proceeding, and to this end the new solicitor is required to give an undertaking to hold the papers without prejudice to the former solicitor's lien, to return them undefaced within a few days after the conclusion of the action, and to allow the former solicitor access to them for the purpose of making out his costs and bringing any action against his client, and a further undertaking by the new solicitor to produce them on any taxation of the former solicitor's costs; and in some cases where the proceedings have been very heavy the Court will direct the costs to be taxed immediately instead of waiting for the general taxation in the cause (*n*). Moreover, the Court does not always direct the former solicitor to hand over all the papers in his possession, but sometimes only such as have come into his hands after the commencement of or for the purposes of the action, and in cases where the Court considers that production only is sufficient instead of delivery over it can make an order to that effect (*o*).

The new solicitor will be required to undertake to hold the papers subject to the old solicitor's lien, notwithstanding that the first solicitor when he undertook the business agreed to look for payment only to the fund sought to be recovered, for such an agreement is not a waiver of the lien (*oo*).

The Court will not make an order to deliver up papers where the costs are barred by the Statute of Limitations, unless the client waives the statute (*p*).

In an old case it was held that the undertaking by the new solicitor to hold the papers subject to his predecessor's lien was tantamount to an undertaking to do

(*n*) *Re Hutchinson*, (1886) 54 L. T. 842, North, J.

(*o*) *Boden* v. *Hensby*, (1892) 1 Ch. 101, North, J.; but see *Re Hawkes*, (1898) 2 Ch. 1, App.

(*oo*) *Scott* v. *Fenning*, (1845), 15 L. J. Chy. 88.

(*p*) *Carter* v. *Carter*, (1886) 53 L. T. 630, Kay, J.

all that was necessary to make the lien effective, and that on the successful termination of the cause the former solicitor was entitled to call on his successor to proceed with the taxation of the costs, issue execution, and pay him the amount of his lien out of the first proceeds, subject only to the costs incurred in the taxation. It is not clear, however, that this case can be relied upon at the present day. Indeed, it seems inconsistent with more recent cases holding that the last solicitor's costs are entitled to be paid first, and the former solicitor's last (*q*).

See also pp. 117–120, *post*, as to some other proceedings.

Sect. VI.

LAPSE OF TIME AND THE STATUTES OF LIMITATION.

Statutes have no effect on lien.

The Statutes of Limitation, though they destroy the remedy by action, do not destroy the remedy by lien. The right to the debt remains though the remedy by action can no longer be pursued, and the remedy by lien or retention of possession is not touched by the statutes. They say only "no *action*" shall be brought after such a number of years; they do not say that the debt shall be extinguished after that period, nor do they say that the lien shall cease to be enforceable in other ways after the expiration of that period (*r*).

If the solicitors to a company that goes into liquidation give up the papers to the official liquidator upon his giving an undertaking to pay their costs out of the first assets that come to his hands, and the arrangement is sanctioned by the Court, the solicitor's claim will not be barred by the Statute of Limitations, no matter what length of time may have elapsed since the undertaking was given (*s*).

(*q*) *Newton* v. *Harland*, 4 Scott, N. R. 769; and see cases on pp. 74 and 22, *ante*.

(*r*) *Carter* v. *Carter*, (1886) 53 L. T. 630, Kay, J.

(*s*) *Re Gloucester, &c., Ry. Co.*, (1860) 29 L. J. Chy. 383.

So far as the Statutes of Limitation are concerned, the same principles apply to the lien on documents as to the lien on funds, so we need not repeat here what we have already said on pp. 59, and 29 to 32, for the reader can readily apply the propositions there laid down, and the authorities cited in support of them, to the case of a lien on documents.

Under common order to tax client waives the Statute of Limitations.

It has been decided that when a client obtains the common order to tax a solicitor's bill he must be taken to have submitted to pay all that shall be found due on taxation, and that he cannot object to any items as barred by the Statute of Limitations (*t*). The reason for this doctrine is that the common order to tax contains a direction that upon payment of what shall be found due on taxation the solicitor shall give up all documents in his possession, but the Court would have no power to order the solicitor to give up documents, in other words to give up his lien, unless all the just and proper items in the bill were paid, whether statute-barred or not. Consequently the client obtaining an order in these terms must be taken to have waived his right to raise the defence of the Statute of Limitations with regard to all the items in the bill. If the client wishes to reserve his right to object to statute-barred items he must take care to have this point specially reserved in the order and to get the direction as to delivery up of papers struck out of the order. An order in this altered form cannot be obtained on a petition of course. A summons must be taken out.

Sect. VII.

GROUNDS FOR RESISTING THE CLAIM OF LIEN.

Lien dependent upon possession, actual or constructive.

Possession is essential to the lien on documents; without possession there can be no lien. In this respect the

(*t*) *Re Margetts*, (1896) 2 Ch. 263, Kekewich, J.; *Re Hughes*, (1899) W. N. 125, Kekewich, J.; *Budgett* v. *Budgett*, (1895) 1 Ch. 202.

lien on documents differs from the lien on funds and the charging order. There may be constructive possession, *e.g.* if possession has been lost through wrongful possession having been obtained by the client or a third person, but still without possession, actual or constructive, there can be no lien.

Change of partners in (1) solicitor's firm. (2) client's firm;

It follows from this proposition that if a firm of solicitors act for a client for a time and then take in an additional partner, and the new firm act for the same client, they retaining his papers all the while, the new firm will have a lien on the papers for the costs earned by themselves, but not for any costs earned by the old firm; and the old firm can have no lien for the costs earned by them, because they have parted with the possession of the papers to the new firm. On the other hand, if there are any papers in the possession of the old firm that they have not handed over to the new firm they will have a lien on the last-mentioned papers for the costs earned by the old firm, but they cannot add to the amount of their lien any costs earned by the new firm (*u*). Where therefore a firm of solicitors take in a new partner they ought in all cases where they wish to preserve their lien, and not to trust simply to the personal liability of their client, to get the old clients to sign an agreement that both firms shall have a lien on all documents in the possession of the new firm. In fact the arrangement would be very similar to the clause usually inserted by bankers in their equitable mortgages to the effect that the security shall continue notwithstanding any changes in the bankers' firm.

The same rule applies where two or more solicitors dissolve partnership, one or more of them continuing the business. The retiring partner has no lien on papers coming into the hands of the continuing partners after

(*u*) *Re Forshaw*, 16 Sim. 121; *Vaughan* v. *Vanderstegen*, 2 Drew. 412; *Re Gough*, (1894) 70 L. T. 725; but see *Pelly* v. *Wathen*, (1850) 7 Ha. 362, and *Gregory* v. *Cresswell*, (1845) 14 L. J. Ch. 300.

the dissolution, for a solicitor cannot sustain an ordinary lien on deeds unless they come into the possession of the same person as the one whose bill of costs is the object of the lien (*x*).

Conversely, if a solicitor acts for a partnership firm and also in a distinct matter for one of the individual partners of that firm, the solicitor can have no lien upon deeds which are the private property of the individual partner for costs due to him from the partnership.

We have seen that the right of the solicitor as against third persons is no higher than that of his client, so that, if the documents ceased to be the property of the client before they came into the possession of the solicitor, the latter was precluded from asserting any lien on them, so in some old cases in bankruptcy it was held that, if the deeds came into the solicitor's possession after an act of bankruptcy had been committed, the solicitor had no lien even if he had no notice of the act of bankruptcy, and even though no adjudication had then taken place (*y*); but those cases are no longer law, for it follows as a consequence from sect. 49 of the Bankruptcy Act, 1883, which relates to protected transactions, that a lien is good if created before notice of an act of bankruptcy (*z*).

Effect of act of bankruptcy.

Another example of the proposition which we have just mentioned arises when the deeds belong to the trustees of a settled estate, but the client is only tenant for life, remainderman, or other limited owner. Thus where a trustee, at the request of the tenant for life, lent the trust-deed to the tenant for life's solicitor, he not being the trustee's solicitor, such loan gave, as it was held, no

Limited owners.

(*x*) *Vaughan* v. *Vanderstegen*, 2 Drew. 409; see also *Re Chatterton*, (1882) 26 Sol. Jo. 59.

(*y*) *Exp. Lee*, 2 Ves. Jun. 285, and cases there cited.

(*z*) *Re Charlwood*, (1894) 1 Q. B. 643; *Re Pollit*, (1893) 1 Q. B. 455, App.; *Re Beyts and Craig*, (1894) 1 Mans. 56; *Re Simonson*, (1894) 1 Q. B. 433; *Re Whitlock*, (1894) 1 Mans. 33; and see article Solicitors' Journal, vol. xxxviii.

lien to the solicitor for his costs due from his client, the tenant for life (*a*).

Order of Court.

Where a judgment directs certain deeds to be delivered up to the plaintiff, they must be deemed to have been the plaintiff's property from the first, so the defendant's solicitor cannot put forward any claim of lien to prevent such delivery to the plaintiff (*b*).

Cause or origin of possession.

For a claim of lien to prevail, it is essential that the documents should have come into the hands of the solicitor strictly as solicitor for the party, and in no other capacity. If they came into his hands in any other capacity, such as steward of a manor, town clerk, next friend, mortgagee, trustee, or receiver, he has no lien as solicitor for his solicitor's costs, whatever right of retention he may have in any other capacity for his salary, commission, or disbursements (*c*). See p. 115, *post*.

A fortiori, if a solicitor obtains possession of documents by wrongful means, he cannot claim a lien on them (*d*).

Married woman restrained from anticipation.

Whether a married woman restrained from anticipation can give her solicitor a lien on the deeds of the property subject to such restraint has not been expressly decided. It was raised, in a well-known case on the law of lien, but it did not become necessary to decide the point. A learned author on the law of lien, Mr. Whitley Stokes, at p. 61 of his work, expressed an opinion that the restraint on anticipation would not prevent the solicitor's lien from attaching; but, with all

(*a*) *Re Mayhew*, (1859) 7 W. R. 351.

(*b*) *Bell* v. *Taylor*, (1836) 8 Sim. 216.

(*c*) *Balch* v. *Symes*, (1823) Tur. & Rus. 87; *Rex* v. *Sankey*, (1836) 5 A. & E. 423; *Pelly* v. *Wathen*, (1850) 7 Ha. 351; *Vaughan* v. *Vanderstegen*, 2 Drew. 409; *Re Llewellin*, (1891) 3 Ch. 145, Chitty, J.; *Re Snell*, (1877) 6 C. D. 105, Jessel, M.R.; *Re Mason and Taylor*, (1879) 10 C. D. 729; *Exp. Fuller*, (1881) 16 C. D. 617, Bacon, C.J.; *Exp. Quinn*, (1884) 49 L. T. 811, Bacon, C.J.; *Re Lawrance*, (1894) 1 Ch. 556, Kekewich, J.; *Re Walker*, (1893) 68 L. T. 517, Kekewich, J.

(*d*) *Wickens* v. *Townsend*, (1830) 1 Russ. & M. 363; *Bull* v. *Faulkner*, (1848) 2 De G. & S. 772.

deference to the opinion of that learned writer, it is submitted that that view is not sound. It was expressed nearly forty years ago, and since then there have been important decisions, both on the law of lien and on a married woman's restraint on anticipation, which are hardly reconcilable with his view. In *Re Vardon's Trusts* (*e*) and other cases following, it was held that any attempt to imperil the security given to a married woman by the restraint on anticipation would be regarded by the Court with disfavour, and in the analogous case of a claim of lien by the solicitor of a company it was held that he could not have a lien on the share register or other books that were required by the Act of Parliament to be kept at the offices of the company; that, in fact, the obligation on the directors of the company to keep the books at their office was inconsistent with their having the right to allow the solicitor to have a lien upon them (see *ante*, p. 85). It is submitted that the same reasoning could be applied to a claim of lien upon the deeds of a married woman restrained from anticipation. In any case, therefore, where a solicitor wishes to have a lien on any such documents, his only safe course is to apply to a Judge under the 39th section of the Conveyancing Act, 1881, for an order to bind her interest in the property to secure the amount of the solicitor's bill of costs. This application ought, of course, to be made before the costs are incurred, except in very special cases, and the Judge would have to be thoroughly satisfied that the costs to be incurred were distinctly for the married woman's benefit.

Specific purpose.

Where documents are handed to a solicitor for a specific purpose inconsistent with his general lien, there is an implied contract on the part of the solicitor that the usual lien shall not attach (*f*).

(*e*) (1886) 31 C. D. 275; also *Edwards* v. *Carter*, (1893) A. C. 360.
(*f*) *Gibson* v. *May*, 4 D. M. & G. 512.

If after failure or performance of the specific purpose for which the documents are deposited they remain with the solicitor with the client's consent, the general lien will attach (*g*).

Other objections to lien.

If a solicitor appears for a client without authority he has no claim for costs, and consequently no right to a lien; for the same reason a solicitor who takes proceedings in a Court to which he has not been admitted has no lien on either funds or documents (*h*). So, too, a solicitor who has not taken out his certificate cannot recover costs either as between party and party or as between solicitor and client during the time that he was uncertificated (Solicitors Act 1874, s. 12); probably, therefore, he can assert no lien on either funds or documents for costs incurred during that period.

Wrongful sale or pledge of documents.

If a solicitor sells or concurs in selling or pledges the documents, thus abusing his right of lien, his lien is forfeited, and the client can bring an action of trover to recover their value (*i*), or the client can, at his election, waive the tort and sue the solicitor for the price obtained as for money had and received to the client's use.

Constructive possession.

If a solicitor gives up possession to a person who is entitled to the documents, such as a prior incumbrancer, the lien is gone even in favour of persons who could not have disputed it (*k*), for the lien is not an incumbrance with a definite priority, but a solicitor does not part with possession by handing the documents to his agent or trustee, for the possession of those persons is deemed the possession of the solicitor; and if a solicitor has a lien upon an ingrossment of a deed he will not lose his lien merely because it is subsequently executed (*l*).

(*g*) *Exp. Pemberton*, (1811) 18 Ves. 282, Eldon, C.

(*h*) *Vincent* v. *Holt*, (1812) 4 Taunt. 452; *Latham* v. *Hide*, 1 Dowl. 594.

(*i*) *Scott* v. *Newington*, 1 Moo. & R. 252; *Jacobs* v. *Latour*, (1828) 5 Bing. 130.

(*k*) *Blunden* v. *Desart*, 2 Dru. & W. 405, St. Leonards, C.

(*l*) *Watson* v. *Lyon*, (1855) 7 D. M. & G. 298.

If a solicitor, after losing possession of a document on which he had a lien, subsequently regains possession by lawful means, his lien will probably revive, but the decisions on this point appear to be somewhat conflicting (*m*).

Waiver of lien.

A lien may be waived either by express words or tacitly by conduct (*n*).

Security for costs usually an abandonment of lien.

If a solicitor takes security for his costs, he *primâ facie* abandons his lien, but it is quite a question of intention, and if he expressly or impliedly stipulates that the security is to be in addition to, and not in substitution for, his lien, he can maintain both his lien and the security (*o*).

Nature of possession.

It is doubtful whether a solicitor loses his lien by claiming the right to retain the documents on other and different grounds. In the analogous case of a warehouseman it has been held that if when goods are demanded of him he rests his refusal upon grounds other than that of his lien for rent, he cannot afterwards resort to his lien as a justification for retaining them (*p*). In a modern case, however, Mr. Justice Chitty seemed to doubt the soundness of this doctrine, or at all events its applicability to solicitors (*q*). It is clear that if a solicitor has only a special lien on deeds, and he claims a general lien, he does not by this erroneous claim lose his special lien (*r*), nor is his lien lost by claiming more than is due to him unless it

(*m*) *Whitehead* v. *Vaughan*, Cooke's Bankrupt Laws, 7th edit. 547 ; *Madden* v. *Kempster*, 1 Camp. 12 ; *Lemprière* v. *Pasley*, 2 T. R. 485.

(*n*) *Buck* v. *Shipham*, 1 Phill. 694 ; *Cowper* v. *Green*, (1840) 7 M. & W. 633.

(*o*) *Re Taylor, Stileman, and Underwood*, (1891) 1 Ch. 590, App. ; *Re Douglas, Norman & Co.*, (1898) 1 Ch. 199, North, J. ; *Bissill* v. *Bradford*, (1894) 9 Times L. R. 337.

(*p*) *Boardman* v. *Sill*, 1 Camp. 410 ; *White* v. *Gainer*, 2 Bing. 24 ; *Owen* v. *Knight*, 4 Bing. N. C. 57. So, in case of auctioneer, *Dirks* v. *Richards*, 4 M. & Gr. 574.

(*q*) *Re Llewellin* (1891) 3 Ch. 145.

(*r*) *Scarfe* v. *Morgan*, (1838) 4 M. & W. 270.

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could be held that he thereby made the whole retainer wrongful (see p. 112, *ante*).

Set-off.

If the client has a debt of equal amount owing to him by the solicitor, whether the lien is gone is doubtful. In the case of the bankruptcy of the solicitor it certainly would be, but there the doctrine of "mutual credit" comes in, which has a wider effect than mere set-off (*s*).

Effect of taking security on lien.

As the presumption that a solicitor who has taken security has intended to abandon his lien may be rebutted by express or implied reservation of his lien, it may be well to notice a few cases where he has been held *not* to have abandoned his lien. Where the security does not cover all the solicitor's costs, but only part of them, he will not be deemed to abandon his lien to the extent of the costs *not* covered by the security (*t*). If the security that has been given is a bill of exchange or promissory note which has been dishonoured before the documents over which the lien is claimed came into the solicitor's hands, the lien will attach. The lien is suspended until the maturity of the bill, and revives on its dishonour (*u*).

Arrest of client.

In the old days of arrest for debt arresting a client on a *capias ad satisfaciendum* did not take away the lien (*x*). So *à fortiori* it would not be lost by getting a client committed to prison under the provisions of the Debtors' Acts, 1869 and 1878 (see p. 73, *ante*).

Estoppel.

If a solicitor acts for a lender in preparing a mortgage, and he does not inform his client the lender that he has a lien on the title-deeds of the property

(*s*) *Exp. Barnett, re Deveze*, L. R. 9 Ch. App. 293; *Pinnock* v. *Harrison* 3 M. & W. 539; Bankruptcy Act, 1883, s. 38.

(*t*) *Balch* v. *Symes*, (1823) T. & R. 92.

(*u*) *Davies* v. *Lowndes*, 3 C. B. 829; compare *Re Romer and Haslam*, (1893) 2 Q. B. 286, App.; but see *Horncastle* v. *Farren*, 3 B. & Ald. 497, and *Bunney* v. *Poyntz*, (1833) 1 N. & M. 229, where bill was taken in payment and not as a mere security; obtaining judgment against client does not prejudice lien; *Re Aiken*, (1894) 1 Ir. R. 225.

(*x*) *O'Brien* v. *Lewis*, (1863) 4 Giff. 396.

Enforcing delivery of papers when costs paid

mortgaged for costs due by the borrower to him, he will be estopped from setting up his lien as against the lender (*y*).

When costs are paid the lien is at an end, and the solicitor cannot excuse himself from delivering the papers up by reason of some third person claiming them (*z*). The client can bring an action of detinue or trover to recover them, or he can apply to the Court for a summary order on the solicitor to give them up under the provisions of the Solicitors Acts, or under its original jurisdiction over solicitors as officers of the Court, or under Order LII. r. 25, provided that it can be shown that the applicant was the client or is a person claiming through a client, that the papers came into the hands of the solicitor in his professional capacity, and that the costs which have been paid were such as the Court would have had jurisdiction to tax (*a*). The Court will not, however, interfere summarily, but will leave the applicant to bring an action in any of the following cases: where there is a *bonâ fide* dispute as to the existence of the lien (*b*); where the solicitor has become bankrupt, and there has been no fraudulent conduct on his part (*c*); where the delivery up of the documents would render him liable to attachment for contempt of another Court (*d*).

Sect. 37 of the Solicitors Act, 1843, provides as follows: "That it shall be lawful for the said respective Courts and Judges, in the same cases in which they are respectively authorised to refer a bill which has been so

(*y*) *Macfarlane* v. *Lister*, (1888) 37 C. D. 88, App.; *Gray* v. *Graham*, (1855) 26 L. T. 111; *Draper* v. *Borlace*, 2 Vern. 370; *Brown* v. *Thorp*, (1842) 11 L. J. N. S. Ch. 73.

(*z*) *Re Emma Silver Co.*, (1876) 24 W. R. 54.

(*a*) *Exp. Cobbledick*, (1883) 12 Q. B. D. 149; *Re Hanbury, Whitting, and Nicholson*, (1897) 75 L. T. 449, Stirling, J.

(*b*) *Exp. Millard*, 1 Dowl. 140; *Brazier* v. *Bryant*, 2 Dowl. 600; *Hodgson* v. *Terrall*, 2 Dowl. 264; *Re Philp*, 6 Jur. 1024; *Beal* v. *Langstaff*, 2 Wils. 371; *Re Walmsley*, 2 A. & E. 575.

(*c*) *Culliford* v. *Warren*, (1828) 8 B. & C. 220; *Re Bonner*, (1833) 4 B. & Ad. 811; *Re Newbery*, (1835) 5 N. & M. 419; 4 Ad. & E. 100.

(*d*) *Re Walmsley*, (1834) 4 N. & M. 543; 1 H. & W. 88.

as aforesaid delivered, sent, or left, to make such order for the delivery by any attorney or solicitor, or the executor, administrator, or assignee of any attorney or solicitor of such bill as aforesaid, and for the delivery up of deeds, documents, or papers in his possession, custody, or power, or otherwise touching the same, in the same manner as has heretofore been done as regards such attorney or solicitor by such Courts or Judges respectively where any such business has been transacted in the Court in which such order was made."

The rules under the Judicature Acts (Order LII. r. 25) provide as follows: "Where the relationship of solicitor and client exists, or has existed, a summons may be issued by the client or his representatives for the delivery of a cash account, or the payment of monies, or the delivery of securities, and the Court or a Judge may from time to time order the respondent to deliver to the applicant a list of the monies or securities which he has in his custody or control on behalf of the applicant, or to bring into Court the whole, or any part of the same, within such time as the Court or a Judge may order. In the event of the respondent alleging that he has a claim for costs, the Court or a Judge may make such provision for the payment or security thereof or the protection of the respondent's lien (if any) as the Court or Judge may think fit."

See likewise cases mentioned in Chitty's Archbold's Practice.

Mode of application.

The application may be made by summons in chambers both in the Chancery and King's Bench Divisions. In either case a master and in the country a district registrar has jurisdiction. Where the business in respect of which the costs were paid consisted of conveyancing or other non-contentious business or of business done in any Court of equity the application had previous to the new rules of 1903 to be made to the Chancery Division, or if the business had been done in any Court of law or in the King's Bench Division the application had to be made

to the King's Bench Division (*e*), but now by the new rule (Order LXV. r. 26a) orders for delivery of bills of costs and for taxation may be made in any division. It seems doubtful, however, whether this applies to applications for delivery up of documents, so it is prudent to adhere to the old practice.

The order, if disobeyed, can be enforced by attachment, sequestration, or by writ for the delivery of the documents or other property (*f*). If a solicitor is struck off the rolls he is still liable to attachment (*g*).

Actual tender not necessary.

It is not essential for the client to make an actual tender of the amount due by him to the solicitor before making the application if the Court is satisfied that the client was ready and willing to pay the sum demanded, but that the solicitor expressed his intention of not accepting it and claimed more. A solicitor is not entitled to insist upon having the amount demanded paid to him "in settlement" before delivering up the papers, but he is entitled to a receipt and list of the documents handed over and to an undertaking to return the papers if any balance is found due to him on taxation and also to payment into Court of a proper sum to answer the costs of taxation, and in one case leave was reserved in case the taxation should turn out to be heavy to apply for an additional sum to be paid into Court (*h*).

All papers except client's letters.

All papers must be handed over when the lien is paid off, copies as well as originals (*i*). The only exceptions are original letters written by the client to the solicitor and copies of letters written by the solicitor to the client or even to third persons, but for which he has made no

(*e*) Solicitors Act, 1843, s. 37; *Re Pollard*, (1888) 20 Q. B. D. 656.

(*f*) *Re Freston*, (1883) 11 Q. B. D. 545; *D.* v. *A. & Co.*, (1900) 1 Ch. 484; *Re Seal*, (1903) 1 Ch. 87; *Re Dudley*, (1884) 12 Q. B. D. 44, App.

(*g*) *Re Strong*, (1886) 32 C. D. 342.

(*h*) *Re Hanbury, Whitting, and Nicholson*, (1896) 75 L. T. 449, Stirling, J.; *Jones* v. *Tarleton*, (1841) 9 M. & W. 675; *Scarfe* v. *Morgan*, (1838) 4 M. & W. 280.

(*i*) *Exp. Horsefall*, (1827) 7 B. & C. 528.

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charge (*k*). The papers must be sorted and properly arranged in reasonable order before being given up (*l*).

Proceedings by persons claiming through client.

It was decided in some old cases in the Court of Chancery that a third person claiming through the client as purchaser or otherwise could institute a suit against the solicitor asking that the amount of his lien might be ascertained, and that he might be decreed to hand over to the purchaser, the plaintiff, the title-deeds on payment to him of the amount so ascertained (*m*). It is probable that a similar action would lie at the present day if it were absolutely necessary for the purpose of doing justice between the parties interested, but that could rarely be the case, as now the Court has power by a summary order not only on the application of the client, but at the instance of any person claiming through him, to direct delivery, taxation, and payment of a solicitor's bill of costs and delivery up of all deeds and papers to the parties entitled to them (*n*), so that the expense of a formal action could hardly ever be necessary, and would be certainly discouraged, unless an overwhelming necessity for that more expensive mode of proceeding were very clearly made out (*o*).

(*k*) *Re Wheatcroft*, (1877) 6 C. D. 97.
(*l*) *North-Western Railway* v. *Sharp*, (1854) 18 Jur. 964.
(*m*) *Fenwick* v. *Reed*, 1 Mer. 123 ; *Christian* v. *Field*, (1842) 2 Ha. 177.
(*n*) Solicitors Act, 1843, ss. 37, 38 & 39 ; see *ante*, p. 118.
(*o*) See, however, *Ward* v. *Lawson* (1873) L. R. 8 Ch. App. 65.

CHAPTER IV.

TOWN AGENT, COUNTRY SOLICITOR, AND LAY CLIENT.

The relations between the town agent, the country solicitor, and the lay client, are of a peculiar character. There is, of course, distinct privity of contract between the lay client and the country solicitor, as there also is between the country solicitor and the town agent; but as a general rule, subject, however, to a few exceptions, there is no privity between the lay client and the town agent (*a*); and although there are cases where the Court has compelled the agent to hand over money to the lay client, such cases do not depend upon any privity of contract, but upon the jurisdiction which the Court exercises over the agent as an officer of the Court, he being always a solicitor.

No privity between agent and lay client.

The agent's name appears on the proceedings in actions and other matters in Court as the solicitor for the client. Pleadings and other proceedings after appearance are served at the agent's office, and the client is bound by all steps taken on his behalf by the agent, including any consents given in the cause (*b*); but the client cannot bring an action against the agent for negligence (*c*), and the client is not liable to the agent for his bill of costs (*d*). Payment by the agent to the country solicitor of any monies recovered on behalf of the client is a good and valid release as against the client, and the receipt of the country solicitor for such monies is a good discharge to

Payment by agent to country solicitor is good discharge.

(*a*) *Hannaford* v. *Syms*, (1898) 79 L. T. 30.

(*b*) *Griffiths* v. *Williams*, 1 T. R. 711; *Withers* v. *Parker*, (1860) 5 H. & N. 725.

(*c*) *Cobb* v. *Becke*, 6 Q. B. 935.

(*d*) *Cobb* v. *Becke*, *supra*; *Scrace* v. *Whittington*, (1824) 2 B. & C. 11.

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the agent. Payment, however, by the defendant to the agent of the amount of debt indorsed on a writ is not payment to the plaintiff as payment to his solicitor would be (*e*).

Exp Edwards.

In the case of *Exp. Edwards* (*f*), a good illustration is afforded of the foregoing propositions. There the town agent of the country solicitor received a sum of 43*l.* recovered in an action in which the lay client was plaintiff; the agent claimed to retain the sum against general agency charges due to him from the country solicitor, although the lay client owed the country solicitor nothing. The matter was referred to the master, who reported the practice to be as follows: "I find the general practice between country solicitors and their town agents to be that, when the writ of execution is issued by the town agent, the town agent receives the proceeds of such execution on behalf of the country solicitor; that the town agent is not entitled to retain any debt or any part of a debt so recovered that he has a lien upon and is entitled to retain the costs so recovered for any costs that may be owing to him by the country solicitor on his general agency account; that the London agent is entitled to the same lien as, and no greater lien than, the country solicitor, and, therefore, if the country solicitor could not retain the debt recovered as aforesaid as against his client, so neither can the London agent retain it." The Court held that town agents of country solicitors have no greater lien than the country solicitors themselves on the money of their clients recovered by them in an action, and that the Court will compel by its summary jurisdiction over its own officers a town agent to pay over to the person entitled any money recovered by him as such agent. In that case the Court fully recognised the rule laid down by the older cases that no action for money had and received could be brought by

(*e*) *Yates* v. *Frecklington*, 2 Doug. 623.
(*f*) (1881) 7 Q. B. D. 155. App.

the client against the town agent by reason of there being no privity of contract between them, but they followed the rule laid down by Lord Tenterden "that the Court exercises a jurisdiction over solicitors, and that it ought to be exercised according to law and conscience, and not by any technical rules" (*g*).

It will be observed in that case that the town agent's lien was fully recognised, but the extent of it was limited, and we shall see shortly what is the precise limit of this lien.

Agent's lien is general but limited.

The agent's lien, like that of the solicitor, is upon funds or documents and other articles, such as models, exhibits, and the like. As against the country solicitor it is general, and extends to all money owing by the country solicitor for costs and disbursements in all matters, but it is limited by the state of accounts between the country solicitor and his own client; *e.g.*, if the client owes nothing to his solicitor, the town agent's lien is gone, and he must pay over the money, as he was ordered to do in *Exp. Edwards*. If, on the other hand, the client owes as much or more to the country solicitor than the amount recovered, and the country solicitor owes as much to the town agent, the latter may retain the whole amount by virtue of his lien. The same principle applies to the lien on documents. The country client cannot compel the town agent to give them up except upon payment to the agent of the amount of his costs against the country solicitor, but not exceeding the amount that the client owes to the country solicitor. Thus if the country solicitor owes the town agent one hundred pounds, while the client owes to the country solicitor fifty pounds, the client must pay the town agent fifty pounds before he can demand the delivery up of his papers (*h*); but such payment will be a good discharge to the client as against the country solicitor or even as against his trustee in

(*g*) *Exp. Bayley*, (1829) 9 B. & C. 691.

(*h*) *Lawrence* v. *Fletcher*, (1879) 12 C. D. 858, Fry, J.; *Re Maud*, 34 Sol. Jo. 709; *Re Jones and Roberts*, (1905) April 15, App.

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bankruptcy, and such solicitor or his trustee cannot sue either the client or the town agent for the amount afterwards (*i*). The doctrine to be found in some old cases that a town agent's lien as against the client is only particular is erroneous, and has been virtually overruled in a recent case. It is not particular, but general, and limited only by the amount due from the client to the country solicitor (*k*).

Case of two country solicitors.

Where in the progress of a cause there have been two or more country solicitors, the town agent's lien will extend to the amount due from each of such solicitors if they have each employed him (*l*).

Extends to professional costs only.

The lien, like that of the ordinary solicitor, extends only to professional charges and payments, and not to money lent or interest. In one of the cases that have been cited it was directed to extend to monies paid for the country solicitor's annual certificates and interest thereon, but that part of the order was probably inserted by consent (*m*).

Loss of lien.

The town agent's lien may be lost or waived in the same manner as that of a solicitor, and he can discharge himself in the same way as a solicitor can, in which case he will be ordered to deliver up the papers on receiving similar undertakings to those given to a retiring solicitor (see *ante*, p. 105).

If the client pays the country solicitor his costs without notice of the town agent's lien, this lien is gone, and the town agent must then deliver up all papers and monies in his hands belonging to the client (*n*).

Order for delivery up.

When the agent's lien has been paid, the Court will make an order on the application of the client to hand

(*i*) *Bray* v. *Hine*, 6 Price, 203 ; 2 Hullock on Lien, 2nd edit. p. 529.

(*k*) *Re Maud*, 34 Sol. Jo. 709.

(*l*) *Ward* v. *Heppell*, 15 Ves. 597.

(*m*) *Lawrence* v. *Fletcher*, *supra*; *Ward* v. *Lawson*, (1890) 43 C. D. 353.

(*n*) *Waller* v. *Holmes*, (1861) 30 L. J. Ch. 24 ; *Vyse* v. *Foster*, (1875) 32 L. T. 219.

over the papers to him, or if he refuses after payment or tender to deliver them up, the client can bring an action of trover against the agent.

Charging order.

As mentioned in an earlier part of this work, it is doubtful whether a town agent can obtain the statutory charging order, the two decisions on the point being conflicting; probably it would be held that he cannot (p. 23, *ante*) but he certainly has the lien on funds. This lien, however, cannot be asserted against real estate (pp. 3 & 9, *ante*). As to whether an agent, like a solicitor, can interfere with the set-off of cross judgments, see p. 71 & 72, *ante*.

Set-off of judgments.

The principles laid down in this chapter would not apply to the case of English solicitors acting as agents for Scotch or Irish solicitors, or to the converse case of Scotch or Irish solicitors acting for English solicitors (*o*).

(*o*) *Hyndman* v. *Ward*, (1900) 15 Times R. 182; *Murray* v. *Honey*, (1900) 44 Sol. Jo. 469.

APPENDIX I.

FORMS.

(*For page of each Form, see Table of Contents at beginning of Book.*)

1. Notice of Lien by Plaintiff's Solicitor.
2. Notice of Lien of Defendant's Solicitor on Costs of Action directed to be paid by the Plaintiff.
3. Notice to Sheriff of Lien of Solicitor for Execution Creditor.
4. Memorandum of Voluntary Charge by Client to save expense of Application for a Charging Order.
5. Agreement by Client that Security shall not prejudice Lien on Funds or Papers.
6. Petition for Charging Order in the Chancery Division.
7. Register of *Lis Pendens*, &c.
8. Affidavit verifying Petition for Charging Order in the Chancery Division.
9. Summons for Charging Order in the Chancery Division.
10. Affidavit in support of Summons for Charging Order in the Chancery Division.
11. Brief to Counsel to apply for Interim Injunction *ex parte* to restrain Receipt by Client of Paymaster-General's Cheque on which Lien is claimed.
12. Charging Order in the Chancery Division.
13. Summons for Stop Order on Fund in Court in aid of Charging Order.
14. Stop Order on Fund in Court.

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15. Affidavit in support of Charging Order in King's Bench Division.
16. Charging Order in King's Bench Division.
17. Summons for Charging Order in King's Bench Division where Order cannot be obtained *ex parte*.
18. Order of Court of Appeal in Bankruptcy discharging Receiving Order and dismissing Petition.
19. Charging Order in Bankruptcy granted *ex parte*.
20. Notice of Motion to discharge Charging Order obtained *ex parte*.
21. Notice of Motion to direct Opposite Parties to pay the Costs to the Solicitor instead of to the Client.
22. Order made on both Motions in Bankruptcy.
23. Order of Court of Appeal dismissing Appeal with Costs.
24. Summons by Town Agent to establish Lien on Costs of Country Solicitor payable out of a Fund in Court or otherwise.
25. Order declaring Town Agent's Lien.
26. Notice of Motion to enforce Lien on Money recovered by way of compromise.
27. Affidavit in Support and Order.
28. Bankruptcy Petition by Solicitor against Client deducting value of Lien or Charging Order.
29. Proof of Debt in Bankruptcy deducting value of Lien or Charging Order.
30. Proof of Debt in Administration Suit where the Estate is insolvent deducting value of Creditor's Right to Lien or Charging Order or both.
31. Order in Chancery Division to tax Solicitor's Bill and for Delivery up of Papers on Payment.
32. Order in King's Bench Division to tax Solicitor's Bill of Costs and for Delivery up of Papers on Payment.
33. Originating Summons under Order LIV., r. 4 (f), for Delivery up of Papers after Payment of Costs.
34. Summons in Chancery Division for Order directing

Delivery up of Papers to New Solicitor for Plaintiff, the former Solicitor having discharged himself.

35. Summons for Order directing the Delivery of Papers to New Solicitor for Plaintiff, or other Person having the Conduct of an Administration, Partition, or other similar Action, the Client having discharged the Solicitor.
36. Originating Summons in the Chancery Division for Solicitor to hand over Papers before Payment on the ground of Urgency on Sum being deposited in Court to secure the Probable Amount of the Costs plus the Costs of Taxation plus the Costs of the Application.
37. Affidavit in support of Summons for Solicitor to hand over Papers before Payment on ground of Urgency on Sum being deposited in Court.
38. Affidavit by Solicitor on delivering up Papers on Oath.
39. Charging Order absolute in Companies winding-up.
40. Acknowledgment of Satisfaction of *lis pendens* previously registered.
41. Costs of Petition for Charging Order.
42. Costs of Summons for Charging Order in the Chancery Division.
43. Costs of Summons for Stop Order in aid of Charging Order or Lien.
44. Costs of Summons for Charging Order in King's Bench Division.
45. Costs in Bankruptcy of Application for Charging Order.
46. Appellant's Costs of Appeal in Bankruptcy.
47. Respondent's Costs of Appeal in Bankruptcy.

Appendix I.

No. 1.

NOTICE OF LIEN BY PLAINTIFF'S SOLICITOR.

In the High Court of Justice,
King's Bench Division,
Between , Plaintiff,
and
, Defendant.

TAKE NOTICE that I have a lien for my costs, charges, and expenses, of and in reference to this action as plaintiff's solicitor on all monies now or hereafter payable to my client by way of compromise or otherwise howsoever.

Dated this day of , 19 .

Plaintiff's Solicitor.

To the defendant and to his solicitor.

No. 2.

NOTICE OF LIEN OF DEFENDANT'S SOLICITOR ON COSTS OF ACTION DIRECTED TO BE PAID BY THE PLAINTIFF.

(*Title of action as in writ.*)

TAKE NOTICE that I have a lien for my costs, charges, and expenses of and in reference to this action as the defendant's solicitor [* on all monies now or hereafter payable to my client by way of compromise or otherwise howsoever, and particularly] on the costs, [charges, and expenses] directed to be paid to the defendant by an order [*or* judgment] in this action dated the day of , 19 .

Dated this day of , 190 .

Defendant's Solicitor.

To the plaintiff and to his solicitor.

* Leave out words in brackets if necessary.

No. 3.

NOTICE TO SHERIFF OF LIEN OF SOLICITOR FOR EXECUTION CREDITOR.

To the Sheriffs of London [*or* the Sheriff of].

TAKE NOTICE that I have a lien for my costs, charges, and expenses, of and in reference to the action of *v.* , 19 , No. [*short title and reference of action*], in which I lately lodged with you a writ of execution by *fieri facias* [*or* venditioni exponas, *or other writ of execution, describing it by its name*], upon the proceeds of execution under the said writ, and that I require you to pay such proceeds to me personally, and to no other party whatsoever.

AND FURTHER TAKE NOTICE that, in default of your disregarding this notice, I shall hold you responsible for all damages, costs, charges, and expenses, which I may sustain or be put to.

Dated this day of , 19 .

[*Signature and address of Solicitor.*]

Solicitor for the Plaintiff [*or* Defendant] in the said action.

No. 4.

MEMORANDUM OF VOLUNTARY CHARGE BY CLIENT TO SAVE EXPENSE OF APPLICATION FOR A CHARGING ORDER.

To [*the solicitor*].

In consideration of the costs owing by me to you on this date [which I have agreed at the sum of *l.*], I hereby charge all the property described in the schedule hereunder written with the payment of all costs, charges,

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and expenses, and all other monies owing by me to you on any account whatsoever. And I declare that this charge shall be in addition to, and not in substitution for, your other rights and remedies, and particularly that this charge shall not prejudice or affect your liens on funds or on documents, or any liens, charges, or securities which you may now or hereafter have for any of the said costs, charges, expenses, or other monies, or prejudice or affect your right to obtain a charging order upon any property now or hereafter to be recovered or preserved. And I agree that this charge shall also extend to the costs of preparing, executing, and stamping the same.

Dated this day of , 190 .

The Schedule above referred to.

[*Description of the property charged.*]

[*Signature of Client.*]

Witness.

No. 5.

AGREEMENT BY CLIENT THAT SECURITY SHALL NOT PREJUDICE LIEN ON FUNDS OR PAPERS.

To [*the solicitor*].

In consideration of your taking a security for your costs, charges, and expenses contained in a memorandum of charge [*or* indenture of mortgage *or other security, describing it*] dated the day of , 19 , and made between , of the one part, &c., I hereby agree that such security shall be in addition to, and not in substitution for, your other rights and remedies, and particularly shall not prejudice or affect any of your liens on funds or documents, or other liens, charges, or

securities which you may now or hereafter have, or your right to obtain a charging order upon any property recovered or preserved or to be recovered or preserved.

Dated this day of , 19 .

[*Signature of Client.*]

Witness.

No. 6.

PETITION FOR CHARGING ORDER IN THE CHANCERY DIVISION.

In the High Court of Justice,
Chancery Division,
Mr. Justice .

(*Title the same as in original action or other proceeding.*)

To His Majesty's High Court of Justice.

The humble petition of , of , in the county of , a solicitor of the Supreme Court, showeth as follows:—

1. Your petitioner was retained and employed by , of , to act as his solicitor in the above action [*or* matter], and your petitioner acted therein until the day of , 190 , as solicitor for the said as plaintiff [*or* defendant] therein.

2. The following proceedings were taken by your petitioner in the said action [*or* matter] [*describe the important proceedings, orders, &c.*]; and by a judgment [*or* order] therein dated the day of , 190 , it was adjudged [*or* ordered] as follows, viz. [*here set out terms of judgment or order*].

3. By virtue of the said judgment [*or* order] the [*here describe the fund or other property recovered or preserved*] was recovered [*or* preserved] for the respondent through the instrumentality of your petitioner.

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4. The costs, charges, and expenses of and incidental to the said action [*or* matter] are still due and owing to your petitioner. [*If some have been paid, add* "save and except the sum of *l.* paid under an order dated the day of , 19 ".]

5. *If the client has changed his solicitor, add:*

"On the day of , 19 , , the new solicitor for the said served a formal notice on your petitioner stating that he had been appointed to act as the solicitor for the said in the place of your petitioner."

Your petitioner therefore humbly prays:—

1. That it may be declared that your petitioner is entitled to a charge upon the said property [*or* fund], such property [*or* fund] having been recovered or preserved for the respondent by your petitioner, for the taxed costs, charges, and expenses of your petitioner of or in reference to the said action [*or* matter] as such solicitor for the said as aforesaid.

2. That the said costs, charges, and expenses, together with the costs of this application, as between solicitor and client, may be taxed and paid or raised out of the said property or fund.

3. That all necessary or proper directions may be given, inquiries made, and accounts taken.

4. *If the fund is in Court, add:*

"That no part of the said fund in Court as aforesaid or the income thereof may be transferred, sold, paid out, or otherwise dealt with without notice to your petitioner."

5. That your petitioner may have such further or other relief as the nature of the case may require.

And your petitioner will ever pray, &c.

Note.—It is intended to serve this petition on

The petition must be modified to suit the circumstances of the case. It is usual to have it settled by counsel. His fee is always allowed on taxation.

The main points to state in the petition are (1) *that the*

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applicant was bonâ fide *retained by some one, but not necessarily by the respondent;* (2) *that proceedings were taken in the same Court and in the same action or matter;* and (3) *that a certain fund or property was recovered or preserved for the respondent through the instrumentality of the petitioner by means of such proceedings.*

No. 7.

LAND REGISTRY, LAND CHARGES DEPARTMENT.

REGISTER OF LIS PENDENS, &c.

Ref. No.

Filed for registration the day of , 190 , by	A Writ of Summons issued out of the Division on the day of , 190 .	Land registry fee **2s. 6d.** each name.
	TITLE OF THE CAUSE.	
Solicitor.	*Plaintiff*, *Defendant.*	

NAME [OR NAMES] OF THE PERSON WHOSE ESTATE IS INTENDED TO BE AFFECTED.

Surname.	Christian name or names.	Usual or last known place of abode.	Title, trade, or profession.

Appendix I.

No. 8.

AFFIDAVIT VERIFYING PETITION FOR CHARGING ORDER IN THE CHANCERY DIVISION.

In the High Court of Justice,
Chancery Division,
Mr. Justice .

(*Title as in petition.*)

I, , of , in the of , a solicitor of the Supreme Court, make oath and say as follows :

This affidavit will be almost an echo of the petition. It may be necessary to have several affidavits verifying different parts of the petition in complicated cases. They are usually settled by counsel, and his fees are allowed on taxation.

No. 9.

SUMMONS FOR CHARGING ORDER IN THE CHANCERY DIVISION.

In the High Court of Justice,
Chancery Division,
Mr. Justice .

(*Same title as in original action or proceeding.*)

Let all parties concerned attend at the chambers of Mr. Justice , Royal Courts of Justice, Strand, London, on , the day of , 190 , at o'clock in the noon, on the hearing of an application on the part of , solicitor of the Supreme Court, formerly solicitor for the above-named plaintiff [*or* defendant *or other party*].

1. That it may be declared that the applicant is entitled to a charge upon [*describe the property or fund recovered or preserved*], the same having been recovered or preserved

for the respondent by the applicant, for the costs, charges, and expenses of the applicant of or in reference to the said cause [*or* matter] as such solicitor [*or* former solicitor] as aforesaid.

2. That the amount of such costs, charges, and expenses when taxed may be raised or paid out of the said property [*or* fund] to the applicant, together with his costs of this application, to be taxed as between solicitor and client.

3. *If the fund is in Court, add:*

"That no part of the said sum of *l.* to the credit of this action [*or* matter] may be transferred, sold, paid out, or otherwise dealt with without notice to the applicant."

4. That the applicant may have such further or other relief as the nature of the case may require.

Dated this day of , 190 .

This summons was taken out by , of , in the of , solicitor for the applicant [*or* applicant in person].

To the above-named .

No. 10.

Form of Affidavit in Support of Summons for Charging Order in the Chancery Division.

This will contain the same allegations as the petition for the same object on p. 133. *It is usually settled by counsel, and his fee is allowed on taxation.*

The title will be the same as in the summons.

Appendix I.

No. 11.

BRIEF TO COUNSEL TO APPLY FOR INTERIM INJUNCTION EX PARTE TO RESTRAIN RECEIPT BY CLIENT OF PAYMASTER-GENERAL'S CHEQUE ON WHICH LIEN IS CLAIMED.

(*Short title of cause.*)

To move *ex parte* for an interim injunction to restrain payment by the Paymaster-General and receipt by [*the client*] of the Paymaster-General's cheque until a petition, summons, or motion by Mr. , [*the client's late solicitor,*] for a charging order or to establish the solicitor's lien can be heard, the applicant undertaking to be answerable in damages. Affidavit of applicant accompanies, also copy order and certificate directing payment to the said [*client*].

The affidavit in support will state the employment of the solicitor, the principal proceedings in the action or matter, including the order and certificate, that the cheque was recovered by the solicitor's proceedings in the action and that he is entitled to a lien thereon.

The order will be to the effect of the brief. It will be prepared by the Registrar and prefaced by words to this effect:

"And the said [*applicant*] by his counsel undertaking to abide by any order that this Court may make as to damages in case the Court shall hereafter consider that the defendant shall have sustained any by reason of this order which the plaintiff ought to pay."

No. 12.

CHARGING ORDER IN THE CHANCERY DIVISION.

(*Title as in petition or summons.*)

Upon the petition [*or* the application by summons] of , of , in the of , a solicitor of the Supreme Court, the solicitor [*or* formerly the solicitor]

for , and upon hearing counsel for the petitioner [*or* counsel *or* the solicitor for the applicant *or* the applicant in person] and for [*the person against whom the charging order is made*], and upon reading the affidavit of filed the day of , 190 , and the affidavit of filed the day of , 190 , and the exhibits referred to in the said affidavits respectively, and the certificate of the fund in Court [*if any*],

This Court doth hereby declare [*or* the Judge doth hereby declare] that the petitioner [*or* applicant] is entitled to a charge upon [*here describe the property or fund recovered or preserved*], the same having been recovered or preserved by the petitioner [*or* applicant] for the said respondent, for the costs, charges, and expenses of the petitioner [*or* applicant] as solicitor for as plaintiff [*or* defendant *or* party attending the proceedings under order dated , 190 , in this action *or* matter] of or in reference to this cause [*or* matter].

And it is ordered that it be referred to the taxing master to tax as between solicitor and client the costs, charges, and expenses of the petitioner [*or* applicant] as solicitor for as plaintiff [*or* defendant *or* party attending, &c.] in this action [*or* matter] of or in reference to this cause [*or* matter], including the costs of this application as between solicitor and client, and it is ordered that the petitioner or applicant do give credit for all sums of money [*if any*] received by him on account of the said in respect of the said costs, charges, and expenses, and the balance is to be certified.

And it is ordered that the funds in Court to the credit of [*the exact title of the account in the Paymaster-General's books to be accurately quoted*] be not sold, transferred, or otherwise dealt with without notice to the petitioner [*or* applicant]. And any of the parties are to be at liberty to apply in chambers generally as they may be advised with reference to the raising and payment of the said costs, charges, and expenses and otherwise.

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The above is a comparatively simple order. For the more complicated ones the collection of forms in Seton on Judgments, 6th edit. pp. 1087 *et seq., and Pemberton on Judgments, 4th edit. pp.* 654 *et seq., should be consulted. In the Chancery Division the order is drawn up by the Registrar, and in very complicated cases the Court sometimes directs minutes of the order to be prepared and settled by counsel, in which case his fee is of course allowed on taxation.*

No. 13.

SUMMONS FOR STOP ORDER ON FUND IN COURT IN AID OF CHARGING ORDER.

(*Formal parts and title as in charging order.*)

On the hearing of an application on the part of [*the solicitor who has obtained the charging order*] that neither the whole nor any part of the *l.* New Consols [*or other stock or cash*] and *l.* cash in Court to the credit of this action, " *v.* ," "Proceeds of Sale Account" [*exact title of credit to be quoted*], may be transferred, sold, paid out, or otherwise dealt with without notice to the applicant, and that the costs of this application may be provided for,

Dated this day of , 190 .

This summons was taken out by , of , in the of , solicitor for the applicant [*or* applicant in person].

To the and their respective Solicitors.

No. 14.

Stop Order on Fund in Court.

(*Formal parts and title as in charging order.*)

Upon the application by summons of , of , in the of , and upon hearing the solicitors for the applicant and for the plaintiffs and defendants, and upon reading the charging order dated , an affidavit of filed the day of , 190 , and the exhibits [*if any*] therein referred to, and the certificate of the fund in Court, IT IS ORDERED that neither the whole nor any part of the *l.* New Consols and *l.* cash in Court to the credit of this action, " *v.* " "Proceeds of Sale Account," be transferred, sold, paid out, or otherwise dealt with without notice to the said [*applicant*]. [*Here add direction for taxation of the costs of the application, and a direction how they are to be dealt with,* e.g., *by adding them to the costs directed to be taxed by the charging order.*]

No. 15.

Affidavit in Support of Charging Order in King's Bench Division.

(*The title should be the same as in the action in which the property was recovered or preserved.*)

I, , of , in the of , a solicitor of the Supreme Court, make oath and say as follows:

1. On or about the day of , 19 , I was retained and employed by the plaintiff [*or* the defendant] to act for him in this action.

2. Various proceedings were taken in this action. I crave leave to refer to the pleadings in this action and to the said proceedings.

Appendix I.

3. By the judgment signed in this action on the day of , 190 , it was adjudged that [*set out terms of judgment*].

4. There is justly due and owing to me by the plaintiff [*or* defendant] a considerable sum for my costs, charges, and expenses of this action. [*If the bill has been sent in, say* "amounting to the sum of *l.* over and above all just credits and allowances." *If the bill has not been made out, say,* "No bill has yet been made out, but I believe that the said costs, charges, and expenses will amount to upwards of *l.* over and above all just credits and allowances."]

5. The monies payable under the said judgment were recovered or preserved by me, and I submit that I am entitled to a charging order thereon for the said costs, charges, and expenses, pursuant to the statute in that case made and provided and otherwise.

6. *If the case is so urgent that an* ex parte *order is asked for in the first instance, add:*

"It is important in the interests of justice that an order *ex parte* should be made in the first instance, otherwise the object of the said charging order may be frustrated." [*Explain why the case is too urgent for a summons.*]

No. 16.

Charging Order in King's Bench Division.

H. 27.

In the High Court of Justice,
King's Bench Division, 19 , , No.
Judge in Chambers,

Between , Plaintiff,
and
, Defendant.

Upon hearing and upon reading the affidavit of filed the day of , 19 , it is ordered

that the said , the solicitor for the in this action, shall have a charge upon for his costs, charges, and expenses of and in reference to this action.

Dated the day of , 19 .

If the above order has been obtained ex parte, *it is conceived that a clause should be added to the following effect:*

"And it is further ordered that the said is to be at liberty to apply to discharge this order if so advised."

No. 17.

SUMMONS FOR CHARGING ORDER IN KING'S BENCH DIVISION WHERE ORDER CANNOT BE OBTAINED EX PARTE.

(*Same title as action in which money or property recovered or preserved, formal parts as usual.*)

On the hearing of an application on the part of [*the solicitor*] that the said [*solicitor*], the solicitor for the in this action, may have a charge upon for his costs, charges, and expenses of and in reference to this action,

To [*the person whose money or property is sought to be charged*].

This kind of summons is usually attended by counsel, and his fee is certified for by the master save under exceptional circumstances.

Appendix I.

No. 18.

ORDER OF COURT OF APPEAL IN BANKRUPTCY DISCHARGING RECEIVING ORDER AND DISMISSING PETITION.

1898.

In the Court of Appeal,
Bankruptcy.

Re a bankruptcy petition presented against .
Ex parte the Debtor.

1900.

Whereas motion was this day made unto this Court by way of appeal in the above matter by Mr. , K.C., and Mr. , of counsel for the appellant, the said debtor herein, that the receiving order made by Mr. Registrar in the above matter on the day of , 19 , upon the petition of , might be set aside, and that the said petition might be dismissed, now upon hearing what was alleged by the said counsel in support of such application and Mr. , of counsel in opposition thereto, THIS COURT DOTH ORDER that the said receiving order dated as aforesaid be rescinded, and that the petition herein dated the and filed be, and the same is hereby, dismissed. AND IT IS FURTHER ORDERED that the costs of and incident to this appeal and the said petition be taxed by the taxing master of this Court and when so taxed be paid by the said , the respondent herein. And further it is ordered that the sum of *l.* deposited upon entering this appeal be repaid to the said [*debtor*], or to Mr. , his solicitor.

By the Court,

L. S.

Registrar.

No. 19.

No. of .

CHARGING ORDER IN BANKRUPTCY GRANTED EX PARTE.

In the High Court of Justice,
In Bankruptcy,
Before Mr. Justice .

In the matter of a petition against presented by and *ex parte* [*the debtor's former solicitor*].

Upon the application of , lately the solicitor for the above-named debtor , and upon reading an affidavit of the applicant filed herein the day of , 19 , and upon hearing Mr. , of counsel for the applicant, IT IS ORDERED that the said , the former solicitor for the debtor in these proceedings, do have a charge upon the sum of *l.* (being the amount of the taxed costs directed to be paid to the said debtor under and by virtue of the order of the Court of Appeal dated , 19) for the said solicitor's costs, charges, and expenses in reference to the appeal and the petition herein.

And it is further ordered that the said [*debtor*] is to be at liberty to apply to discharge this order if so advised.

By the Court,

Registrar.

No. 20.

NOTICE OF MOTION TO DISCHARGE CHARGING ORDER OBTAINED EX PARTE.

In the High Court of Justice,
In Bankruptcy

In the matter of a petition against presented by *ex parte* [*the debtor's former solicitor*].

TAKE NOTICE that application will be made by counsel

Appendix I.

on behalf of the above-named [*the debtor's former solicitor*] to the Judge in chambers, room No. , Royal Courts of Justice, Strand, on , the day of , 190 , at of the clock in the forenoon, that the charging order dated the day of , 19 , on the application of [*the debtor's former solicitor*], may be discharged, and that the said [*debtor's former solicitor*] may be ordered to pay the costs of and incidental to this application.

Dated this , 190 .

Solicitor for the said [*debtor*].

To Mr. [*the debtor's former solicitor*].

No. 21.

NOTICE OF MOTION TO DIRECT OPPOSITE PARTIES TO PAY THE COSTS TO THE SOLICITOR INSTEAD OF TO THE CLIENT.

In the High Court of Justice,
In Bankruptcy.

Filed the day of , 19 .

In the matter of a petition against presented by *ex parte* [*the debtor's former solicitor*].

TAKE NOTICE that application will be made by me to the Judge in chambers, room No. , Royal Courts of Justice, Strand, W.C., on , the day of , 19 , at o'clock in the forenoon precisely, for an order that the above-named *the* [*petitioning creditor*] may be directed to pay to me the sum of *l.* charged in my favour by the charging order made herein on the , 19 , upon the grounds set forth in the annexed affidavit, and that the above-named [*debtor*] do pay

the costs of and incident to the application for the said charging order and this application.

Dated this day of , 19 .

Yours, etc. [*the debtor's former solicitor*].

To [*the debtor*] and to the petitioning creditor and to their respective solicitors.

No. 22.

ORDER MADE ON BOTH MOTIONS IN BANKRUPTCY.

In the High Court of Justice,
In Bankruptcy,
Mr. Justice ,
In Chambers. 19 .

In the matter of a petition against presented by *ex parte* [*the debtor's former solicitor*].

Upon the application of , lately the solicitor for the above-mentioned debtor , and upon reading an affidavit of the applicant filed herein the day of , 19 , a joint affidavit of the applicant and filed herein the day of , 19 , the order herein dated , 19 , and the charging order herein dated , 19 , and upon hearing Mr. , of counsel for the applicant, Mr. , of counsel for the said [*debtor*], and Mr. , solicitor for [*the petitioning creditor*], it is ordered that the application of [*the debtor*] to discharge the said charging order of , 19 , be refused with costs to be taxed and paid by the said [*debtor*] to the said [*the debtor's former solicitor*]. And it is further ordered that the said [*petitioning creditor*] do pay to the applicant instead of to the said [*debtor*] the said sum of *l.* after deducting the

Appendix I.

said [*petitioning creditor's*] costs of this application to be taxed, and that the said [*debtor*] do pay to the said [*his former solicitor*] the costs of and incident to the application for the said charging order and this application, and that the said [*former solicitor*] be at liberty to retain the amount of such costs as aforesaid out of the said sum of *l.* payable under this order. This order to be suspended if the said [*debtor*] gives notice of appeal and enters appeal within ten days from this date. Leave to appeal.

Dated this day of , 19 .

By the Court,

Registrar.

No. 23.

ORDER OF COURT OF APPEAL DISMISSING APPEAL WITH COSTS.

In the Court of Appeal,
On Appeal from
The High Court of Justice
In Bankruptcy. 1900.

In the matter of a petition against presented by *ex parte* [*the former solicitor*] and .

Whereas motion was this day made unto this Court by way of appeal in this above matter by Mr. , of counsel for the appellant, the said [*debtor*], that the order of the Hon. Mr. Justice . dated the day of , 19 , whereby he ordered that the application of the above-named [*debtor*] to discharge a charging order of the , 19 , should be refused with costs to be taxed and paid by the above-named [*debtor*] to the above-named [*former solicitor*], and whereby it was

further ordered that the above-named [*petitioning creditor*] should pay to the above-named [*former solicitor*] the sum of *l.* after deducting his costs, and whereby it was further ordered that the above-named [*debtor*] should pay to the said [*former solicitor*] the costs of and incident to the application for the said charging order, and that application, and whereby it was further ordered that the said [*former solicitor*] should be at liberty to retain the amount of such costs out of the said sum of *l.*, might be reversed, and that the said and order might be discharged with costs, now upon hearing what was alleged by the said counsel in support of such application, and Mr. , K.C., and Mr. , of counsel in opposition thereto, this Court doth order that the said order of Mr. Justice be affirmed, and that this appeal be dismissed, and that the said [*debtor*] do pay to the said [*his former solicitor*] the costs of and occasioned by this appeal, to be taxed by the taxing master.

By the Court,

Registrar.

(*Orders in Chancery Division and King's Bench Division to pay taxed costs of action to the solicitor instead of to the client will be in similar terms to the order in the King's Bench Division* (*bankruptcy*), *ante.*)

No. 24.

SUMMONS BY TOWN AGENT TO ESTABLISH LIEN ON COSTS OF COUNTRY SOLICITOR PAYABLE OUT OF A FUND IN COURT OR OTHERWISE.

(*Formal parts as in previous Forms.*)

(*Same title as action or other proceeding in which the money, &c., was recovered.*)

An application on the part of the [*town agents*],

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formerly agents for [*the country solicitor*], the plaintiff's late solicitor in this action,

1. That it may be declared that the applicants are entitled to a lien or charge in respect of all their agency charges and disbursements as town agents of the said [*country solicitor*] upon the costs of the plaintiff of this action ordered to be taxed as between solicitor and client and to be paid out of the fund in Court by the order in this action on further consideration dated the day of , 190 , and that the amount of such costs when taxed may be paid out of the funds mentioned in such order to the applicants,

2. Or such further or other order as the nature of the case may require.

To the plaintiff and to the said [*country solicitor*], and to [*his new town agents*].

No. 25.

ORDER DECLARING TOWN AGENT'S LIEN.

(*Same title as in summons.*)

Upon the application by summons dated the day of , 190 , of [*town agent*], of , in the of , a solicitor of the Supreme Court, and upon hearing the said [*town agent*] and the solicitor for the plaintiff and for the said [*country solicitor*], and upon reading the affidavit of filed the day of , 190 , and the affidavit of filed the day of , 190 , and the exhibits referred to in such affidavits respectively, and upon reading [*here enter all other evidence read on the summons*] and the certificate of the fund in Court, THE JUDGE DOTH HEREBY DECLARE that the said [*town agent*] is entitled to a lien or charge in respect of his agency charges and disbursements as town agent

of the said [*country solicitor*] upon the costs of the plaintiff of this action, ordered to be taxed as between solicitor and client and to be paid out of the fund in Court by the order on further consideration dated the day of , 190 .

And it is ordered that it be referred to the Taxing Master to tax the costs of the [*town agent*] of this application, such costs to be added to the security hereby provided of the said [*town agent*].

And it is ordered that the funds in Court to the credit of [*exact credit to be quoted*] be not sold, transferred, or otherwise dealt with without notice to the said town agent. And it is ordered that any of the parties are to be at liberty to apply in chambers generally as they may be advised.

No. 26.

Notice of Motion to enforce Lien on Money recovered by way of Compromise.

In the High Court of Justice,
Chancery Division,
Mr. Justice ,

Between , Plaintiff,
and
, Defendant.

Take notice that this Honourable Court will be moved before the Hon. Mr. Justice on , the day of , 190 , or so soon thereafter as counsel can be heard, by counsel on behalf of , formerly the solicitor for the plaintiff in this action, that it may be referred to the taxing master to tax as between solicitor and client the costs, charges, and expenses of the said [*former solicitor*] as solicitor for the plaintiff in this action of or in reference to this action, the said

Appendix I.

[*former solicitor*] on such taxation to give credit for all sums of money (if any) received by him on account of the plaintiff in respect of the said costs, charges, and expenses, and the balance to be certified, and that the amount of the lien or charge of the said [*solicitor*] may be ascertained in respect of the sum of *l.* paid to the plaintiff in compromise of this action, and that the plaintiff and defendant and the defendant's solicitor personally may be ordered to pay to the said [*plaintiff's former solicitor*] the said sum of *l.* or such less sum as shall be sufficient to satisfy and discharge the said lien together with the costs of this application to be taxed.

Dated this day of , 190 .

[*Plaintiff's former solicitor*],
Street,
London.

To the plaintiff and defendant and to Mr. [*the defendant's solicitor*] and to their respective solicitors.

No. 27.

AFFIDAVIT IN SUPPORT.

This will state the employment of the solicitor, the principal proceedings in the action; that the other parties had notice of the plaintiff's late solicitor's lien, or (if they had not notice) that they colluded to deprive him of his costs; that the amount of the compromise has been paid over; that it was recovered by the said solicitor's proceedings in the action, and that he is entitled to a lien thereon.

The order will be in the terms of the notice of motion.

No. 28.

BANKRUPTCY PETITION BY SOLICITOR AGAINST CLIENT DEDUCTING VALUE OF LIEN OR CHARGING ORDER.

In the High Court of Justice,
In Bankruptcy. No. of 19 .

Re , *ex parte* .

I, , of , hereby petition the Court that a receiving order be made in respect of the estate of , and say:—

1. That the said ha for the greater part of six months next preceding the presentation of this petition resided at , within the district of this Court.

2. That the said is justly and truly indebted to in the sum of *l.* [*Set out amount of debt or debts, and the consideration.*]

3. That I hold security for the payment of [*or* part of] the said sum, and I estimate the value of such security at the sum of *l.* .

4. That within three months before the date of presentation of this petition has committed the following act [*or* acts] of bankruptcy, namely [*here set out separately the nature and date or dates of the act or acts of bankruptcy relied on*].

Dated this day of , 19 .

(Signed)

Signed by the petitioner in my presence.

[*Signature, address, and description of Witness.*]

(*See Rule* 146.)

This is the petition referred to in the affidavit of sworn before me this day of , 19 .

Filed the day of , 19 , and allotted to Mr. Registrar .

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Note.—If there be more than one petitioner, and they do not sign together, the signature of each must be separately attested, *e.g.*, "Signed by the petitioner, E. F., in my presence." If the petition be signed by a firm, the partner signing should add also his own signature, *e.g.*, "A. S. & Co., by J. S., a partner in the said firm." If the debtor resides at any place other than the place where he carries on business both addresses should be inserted.

INDORSEMENT.

This petition having been presented to the Court on the day of , 19 , it is ordered that this petition shall be heard at the Court sitting in Bankruptcy, Carey Street, Lincoln's Inn, on the day of , 19 , at o'clock in the noon.

And you, the said , are to take notice that, if you intend to dispute the truth of any of the statements contained in the petition, you must file with the registrar of this Court a notice showing the grounds upon which you intend to dispute the same, and send by post a copy of the notice to the petitioner three days before the date fixed for the hearing.

No. 29.

PROOF OF DEBT IN BANKRUPTCY DEDUCTING VALUE OF LIEN OR CHARGING ORDER.

THE BANKRUPTCY ACT, 1883 AND 1890.

In the Court of ,
In Bankruptcy. No. of 190 .

Re

I, of , in the county of , make oath and say:—

That the said w at the date of the receiving order, viz., the day of , 190 , and still ,

justly and truly indebted to in the sum of pounds shillings and pence for work done and money paid by me as his solicitor, as shown by the account indorsed hereon [*or* by the account hereto annexed marked with the letter "A"], or by the following account, viz., , for which sum or any part thereof I say that I have not, nor hath or any person by order, or to my knowledge or belief for use, had or received any manner of satisfaction or security whatsoever, save and except my lien [and charging order] upon the bankrupt's monies, property, deeds, documents, books, papers, and writings, particulars of which, with the dates when such liens [and order] were given, are inserted in the remarks column of the account indorsed hereon. I assess the value of the said lien [and order] at *l.*, and save and except the following:—

Date.	Drawer.	Acceptor.	Amount.	Due date.

Sworn at , in the of , this day of , 190 , before me. } [*Deponent's signature.*]

Particulars of account referred to on other side. (Credit should be given for contra accounts.)

If space not sufficient, let the particulars be annexed, but where the particulars are on a separate sheet of paper the same must be marked by the person before whom the affidavit is sworn, thus:—

In Bankruptcy—"This is the account marked with

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the letter 'A' referred to in the annexed proof of debt made by *in re* sworn before me this day of , 190 ."

(Signed)

Commissioner or Officer administering Oath.

Date.	Consideration.	Amount.	Remarks. * The vouchers (if any) by which the account can be substantiated should be set out here.
			*

[*Signature of Deponent.*]

[*Signature of Commissioner or Officer administering Oath.*]

No. 30.

PROOF OF DEBT IN ADMINISTRATION SUIT (WHERE THE ESTATE IS INSOLVENT) DEDUCTING VALUE OF CREDITOR'S RIGHT TO LIEN OR CHARGING ORDER OR BOTH.

In the High Court of Justice,
Chancery Division,
Mr. Justice .

(*Title of cause.*)

I, , of , in the of , solicitor, make oath and say as follows:

1. That , the testator in this cause, was at the

date of his death on the day of , 190 , and his estate still is, justly and truly indebted to me in the sum of *l.* for work done and money paid by me as his solicitor at his request.

2. I, speaking positively for myself and to the best of my knowledge and belief for other persons, say that I have not, nor has nor have any person or persons by my order or to the best of my knowledge and belief for my use, received the said sum of *l.* or any part thereof, or any security or satisfaction for the same or any part thereof, save and except my lien and charging order upon the said testator's monies, property deeds, documents, books, papers, and writings. I assess the value of the said lien and charging order at *l.*, which I claim to deduct from the said sum of *l.*

Sworn at, &c.

No. 31.

ORDER IN CHANCERY DIVISION TO TAX SOLICITOR'S BILL AND FOR DELIVERY UP OF PAPERS ON PAYMENT.

In the High Court of Justice,
Chancery Division,
Mr. Justice .

Mr. Registrar, the day of , 190 .

In the matter of

Upon the petition of this day preferred unto this Court, it was alleged that the petitioner employed the above-named .

That the said solicitor on or about the day of delivered unto the petitioner bill of fees and disbursements which, as the petitioner advised, ought to be taxed.

That the petitioner submit to pay what shall appear

Appendix I.

to be due to the said solicitor on the taxation of said bill. It was therefore prayed, and it is accordingly ordered, that it be referred to the taxing master to tax and settle the said bill, and that the petitioner and also the said solicitor do produce before the said master upon oath as he shall direct all books, papers, and writings in their custody or power respectively relating to the matters hereby referred or any of them, and that they be examined touching the same matters or any of them as the said master shall direct. And it is ordered that the said solicitor do give credit for all sums of money by received of or on account of the petitioner , and that be at liberty to charge all sums of money paid by to or on account of the petitioner . And it is ordered that if such bill when taxed be less by a sixth part than the said bill as delivered the said master do tax the petitioner costs of this reference, and if such bill when taxed shall not be less by a sixth part than the said bill as delivered the said master do tax the said solicitor costs of this reference. And the said master is to certify the amount due from the petitioner to the said solicitor or from to the petitioner , as the case may be, having regard to the costs of this reference so to be taxed as aforesaid and any sum or sums of money which may have been so received or paid as aforesaid. And it is ordered that the amount so to be certified be paid within twenty-one days after service of this order and of the taxing master's certificate to be made in pursuance thereof by the party from whom to the party to whom the same shall be certified to be due unless the Court shall upon special circumstances, to be certified by the said master, otherwise order upon application to be made within one week after the date of the said master's certificate by the party liable to pay such amount. And it is ordered that upon payment by the petitioner to the said solicitor of what may be certified to be due to as aforesaid or in

case it shall appear that there is nothing due to he the said solicitor do deliver to the petitioner upon oath all deeds, books, papers, and writings in custody or power belonging to the petitioner . And it is ordered that no proceedings be commenced against the petitioner in respect of the said bill pending this reference.

No. 32.

ORDER IN KING'S BENCH DIVISION TO TAX SOLICITOR'S BILL OF COSTS AND FOR DELIVERY UP OF PAPERS ON PAYMENT.

In the High Court of Justice,
King's Bench Division,
Master Master in Chambers.

In the matter of the taxation of costs, and in the matter of , Gentlem of the solicitors of the Supreme Court.

Upon hearing the solicitor for (hereinafter called the applicant) and for and upon reading the affidavit of filed herein, it is ordered that the bill of fees, charges, and disbursements delivered to the applicant by the above-named solicitor be referred to the taxing officer to be taxed, and that the said solicitor give credit for all sums of money by him received of or on account of the applicant, and that he refund what, if anything, he may on such taxation appear to have been overpaid.

And it is further ordered that the taxing officer tax the costs of the reference, and certify what shall be found due to or from either party in respect of the bill and demand and of the costs of the reference to be charged (if payable) according to the event of the taxation pursuant to the statute.

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And it is further ordered that the said solicitor do not commence or prosecute any cause or matter touching the demand pending the reference.

And it is further ordered that upon payment by the applicant of what (if anything) may appear to be due to the said solicitor the said solicitor do (if required) deliver up to the applicant, or as he may direct, all deeds, books, papers, and writings in the said solicitor's possession, custody, or power belonging to the applicant.

Dated the day of , 190 .

In pursuance of the within order, I have taxed the bill of costs thereby referred as follows:

	£	s.	d.
Amount of bill delivered			
Taxed off			
Add (or deduct) costs of taxation			
... ...			
Add (or deduct) balance due on cash account			
Balance due	£		

No. 33.

Originating Summons under Order LIV. r. 4 (f) for Delivery up of Papers after Payment of Costs.

In the High Court of Justice,
Division.

(*If in the Chancery Division, add the name of the Judge to whom the matter is assigned.*)

In the matter of A. B., a solicitor.

Let A. B., of , attend [*if in the Chancery Division*, at the chambers of Mr. Justice , at the time

specified in the margin hereof] [*if in King's Bench*, the Master in Chambers, Central Office, Royal Courts of Justice, Strand, London] [*if in Probate Division*, at the Probate Registry; *or if in Admiralty Division*, at the Admiralty Registry] on the day of , 19 , at o'clock in the noon, on the hearing of an application on the part of [*the client's name, address, and occupation*] that the said A. B. may be ordered to deliver up to the applicant, or as he may direct upon oath, all deeds, books, papers, and writings in the said A. B.'s possession, custody, or power belonging to the applicant. [*If the solicitor retains them wrongfully, but not otherwise, add* "and that the said A. B. may be ordered to pay the costs of this application to be taxed."]

Note.—It will not be necessary for you to enter an appearance in the Central Office, but if you do not attend either in person or by your solicitor at the time and place above mentioned [*or* at the time mentioned in the margin hereof], such order will be made and proceedings taken as the Judge [*or* master] may think just and expedient.

To A. B.

An affidavit should be made in support.

The order will follow the terms of the summons. It will be prefaced by the usual undertakings by the new solicitor, viz.—

1. *To produce the documents at all times on taxation of the costs.*

2. *To return the documents to the former solicitor if the result of the taxation is to show a balance due to him.*

If client cannot tax or does not wish to tax, these undertakings will not be required, but a waiver of taxation should be inserted in the order.

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No. 34.

SUMMONS IN CHANCERY DIVISION FOR ORDER DIRECTING DELIVERY UP OF PAPERS TO NEW SOLICITOR FOR PLAINTIFF, THE FORMER SOLICITOR HAVING DISCHARGED HIMSELF.

(*Same title as action.*)

(*Formal parts as in previous forms.*)

On the hearing of an application on the part of the plaintiff that A. B., the former solicitor for the plaintiff, may be ordered within seven days after service of the order to be made on this application to deliver up to C. D., the new solicitor for the plaintiff, all such briefs, pleadings, office and other copies, shorthand notes, deeds, books, documents, and proceedings belonging to the plaintiff connected with this action, as are in the possession, custody, or power of the said A. B., the said C. D. hereby offering to give such undertakings as the judge shall direct, and that the costs of this application may be provided for,

To the said A. B. [*the former solicitor*].

The affidavit in support must state shortly—(1) *the proceedings in the action;* (2) *that the former solicitor has discharged himself;* (3) *that notice of change of solicitors has been filed and served;* (4) *that the documents are necessary for conduct of the action;* (5) *that their delivery has been demanded and refused;* (6) *that the undertakings mentioned below were offered to the former solicitor, but refused.*

The order will be in the terms of the summons, but it will be prefaced by the undertakings required to be given by the new solicitor to the former solicitor. These are usually the following:—

1. *To prosecute the action with due diligence.*

2. *To hold all the documents without prejudice to the former solicitor's lien.*

3. *To return the documents undefaced to the former*

solicitor within ten days after the action is disposed of, or when the Judge shall direct.

4. *To allow inspection of the documents at all times by the former solicitor (a) to enable him to make out his bill of costs and cash account; (b) to enable him to bring an action to recover them.*

5. *To produce the documents on the taxation of the former solicitor's costs, and on the proceedings and trial in the former solicitor's action to recover them.*

The order will also provide for the costs of the application making the former solicitor pay them, or making them costs in the cause, and will give liberty to all parties (including the former solicitor) to apply to the Judge in chambers as there may be occasion.

No. 35.

SUMMONS FOR ORDER DIRECTING DELIVERY OF PAPERS TO NEW SOLICITOR FOR PLAINTIFF OR OTHER PERSON HAVING THE CONDUCT OF AN ADMINISTRATION, PARTITION, OR OTHER SIMILAR ACTION, THE CLIENT HAVING DISCHARGED THE SOLICITOR.

(*Same title as action.*)

(*Formal parts as in previous forms.*)

On the hearing of an application on the part of the plaintiff [*or* , the person having the conduct of this action] that , the new solicitor for the plaintiff [*or* for the person having the conduct of this action], so long as he shall be the solicitor for the plaintiff [*or* for the said] may have full liberty of inspection of all such briefs, pleadings, office and other copies, shorthand notes, deeds, books, documents, and proceedings connected with this action as are in the possession or power of , the late solicitor for the plaintiff [*or* for the said], and that the said [*late solicitor*] may be ordered to deliver over to the said [*the new solicitor*] all such of the last-mentioned

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briefs, pleadings, office and other copies, shorthand notes, deeds, papers, books, documents, and proceedings as may from time to time be required by the said [*new solicitor*] for carrying on the proceedings in the said action, the necessity for such delivery to be decided by the Judge in chambers in case the parties differ, the said [*new solicitor*] undertaking that such briefs, pleadings, office and other copies, shorthand notes and papers, books, documents, and proceedings as shall be delivered to him under the order to be made hereon, shall be received by him without prejudice to any right of lien of the said [*former solicitor*] and shall be respectively returned to the said [*former solicitor*] undefaced if and when the Judge in chambers shall so direct, and the said [*new solicitor*] further undertaking to produce to the said [*former solicitor*], and for the purposes of taxation, the said briefs, pleadings, office and other copies, shorthand notes, deeds, books, documents, and proceedings that shall be so delivered at all times prior to the payment of the said [*former solicitor's*] bill of costs, fees, and disbursements.

To [*the former solicitor*].

No. 36.

ORIGINATING SUMMONS IN THE CHANCERY DIVISION FOR SOLICITOR TO HAND OVER PAPERS BEFORE PAYMENT ON THE GROUND OF URGENCY ON SUM BEING DEPOSITED IN COURT TO SECURE THE PROBABLE AMOUNT OF THE COSTS PLUS THE COSTS OF TAXATION PLUS THE COSTS OF THE APPLICATION.

In the matter of , gentleman, one of the solicitors of the Supreme Court.

[*Formal parts as in former originating summons.*]

On the hearing of an application on the part of [*the client*], of , in the of ,

1. That upon the applicant paying into Court to

abide the result of the taxation of the costs, charges, and expenses of the above-named solicitor the sum of *l.* or such other sum as the Judge may think proper, and upon the applicant's present solicitor giving such undertakings as the Judge shall direct, the above-named solicitor may be ordered to deliver up to the said applicant's present solicitor upon oath all deeds, books, papers, and writings in his possession, custody, or power belonging to the applicant.

2. That it may be referred to the taxing master to tax and settle the costs, charges, and expenses owing by the applicant to the said solicitor, and that the applicant and the said solicitor may be ordered to produce before the said master upon oath as he shall direct all books, papers, and writings in their custody or power respectively relating to the matters hereby referred or any of them, and that they be examined touching the same matters or any of them as the said master shall direct, and that the said solicitor may be directed to give credit for all sums of money by him received of or on account of the applicant, and that he be at liberty to charge all sums of money paid by him to or on account of the petitioner, and that if the bill when taxed be less by a sixth part than the said bill as delivered the said master do tax the applicant's costs of the reference, and if such bill when taxed shall not be less by a sixth part than the said bill as delivered the said master do tax the said solicitor his costs of this reference, and the said master may certify the amount due from the applicant to the said solicitor, having regard to the costs of this reference so to be taxed as aforesaid and any sum or sums of money which may have been so received or paid as aforesaid, and that the amount so to be certified may be paid out of the money so to be paid into Court as aforesaid.

3. That it may be ordered that no proceedings be

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commenced against the applicant in respect of the said costs, charges, or expenses pending the reference.

4. That the applicant may be ordered to pay such further sum [*if any*] as may be found due from him over and above the amount so to be paid into Court as aforesaid.

5. Or for such further or other relief as the nature of the case may require.

To the said [*the former solicitor*].

Note.—It will not be necessary for you to enter an appearance in the Central Office, &c., &c. [*Continue as in former originating summons.*]

No. 37.

AFFIDAVIT IN SUPPORT OF SUMMONS FOR SOLICITOR TO HAND OVER PAPERS BEFORE PAYMENT ON GROUND OF URGENCY ON SUM BEING DEPOSITED IN COURT.

The affidavit must show urgent reasons why the client cannot wait for his papers until the bill has been taxed in the usual way.

The order will be in terms of the summons, the formal parts being supplied as usual. It will be prefaced by the undertakings required to be given by the new solicitor to the former solicitor. These are usually the following:—

1. *To allow inspection of the documents at all times by the former solicitor (a) to enable him to make out his bill of costs and cash account; (b) to enable him to bring an action for his costs* AFTER *the taxation is over.*

2. *To produce the documents at all times on taxation of the costs as the former solicitor or the taxing master shall require.*

The order will also direct taxation and payment by the client to the former solicitor of his costs of and occasioned by the

application, and will give liberty to all parties to apply to the Judge in chambers as there may be occasion. As the order is an indulgence to the client, he will have to pay all the costs occasioned thereby.

No. 38.

AFFIDAVIT BY SOLICITOR ON DELIVERING UP PAPERS ON OATH.

(*Same title as order directing delivery upon oath.*)

I, , of , in the of , make oath and say as follows :—

1. Pursuant to the order made in this action [*or* matter] on the day of , 19 , I have on the day of , 19 , delivered up to [*the client*] all deeds, books, papers, and writings [*here follow exact words of order*] which at the date of the said order were in my custody or power [*here follow words of order*] belonging to the said [*client*].

2. To the best of my knowledge, recollection, information, and belief I had not at the date of the said order or since, and I have not now, any deeds, books, papers, or writings [*follow exact words of order*] in my custody or power [*exact words*] belonging to the said [*client*].

No. 39.

CHARGING ORDER ABSOLUTE IN COMPANIES' WINDING-UP.

In the High Court of Justice,
Companies (Winding-up),
Mr. Justice . No. of .

In the matter of the Companies Acts, 1862 to 1900, and in the matter of , Limited.

WHEREAS by an order dated the it was ordered

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that unless sufficient cause should be shown to the contrary before the Registrar (Companies, Winding-up), Bankruptcy Buildings, Carey Street, London, on , at o'clock , the sum of *l.*, being the proceeds, &c., more particularly mentioned in the affidavit of filed the , should in the meantime stand charged with the payment to (*the applicant named on the said order*) of the sum of *l.*, the taxed costs of the applicant of certain proceedings in the above-mentioned matter as the solicitor for the said liquidator, together with the applicant's costs of this application,

And the said application of the said , having been adjourned to be heard in Court, coming on this day to be heard accordingly, and upon hearing counsel for the applicant and for the said and upon reading the following affidavit, viz.,—

This Court doth declare that the applicant, the said , as the solicitor employed by , the liquidator of the above-named company, is entitled to a charge upon the sum of *l.*, now in the hands of the said liquidator , being the said proceeds, &c., as being property recovered or preserved for the above-named company and its liquidator, for the sum of *l.*, the amount of the costs, charges, and expenses, taxed pursuant to the said order dated the , and also for the sum of *l.*, the amount of the ascertained costs of the said applicant of this application.

Registrar.

Land registry fee **2***s.* **6***d.* each name.

No. 40.

Satisfaction of *lis pendens*.

Land Registry, Land Charges Department.

Satisfaction is acknowledged between , plaintiff (*grantor*), and , defendant (*grantee*), as to a dated the day of , 190 (for payment of the annual sum [s] of *l.*), a memorandum of

which said was left in the Registry of Judgments [*or* in the Land Registry, *as the case may be*] on the day of , 19 , to affect the estate of . and do hereby expressly nominate and appoint , solicitor, to witness and attest the execution of this acknowledgment of satisfaction.

Signed by the said in the presence of me the undersigned , of , in the of , one of the solicitors of the Supreme Court of Judicature, and I hereby declare myself to be the solicitor for and on behalf of the said expressly named by h and attending at h request to inform h of the nature and effect of this acknowledgment of satisfaction (which I accordingly did before the same was signed by h). And I also declare that I subscribe my name as a witness hereto as such solicitor. } the above-named plaintiff the day of , 190 .

Filed on the day of , 190 , by , of , solicitor.

No. 41.

COSTS OF PETITION FOR CHARGING ORDER.

(*Title as in petition.*)

Costs of petition for charging order to be taxed as between solicitor and client under order dated , 190 .

	Lower Scale. £	*s.*	*d.*	Higher Scale. £	*s.*	*d.*
Instructions for petition	0	6	8	0	13	4
Registering lis pendens *is not allowed on taxation.*						
Attending bespeaking certificate of fund	0	6	8	0	6	8

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	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
Paid for same	0	1	0	0	1	0
Drawing petition, per folio ...	0	1	0	0	1	0
Fee to counsel to settle same and clerk						
Attending him						
Ingrossing petition for presentation, per folio	0	0	4	0	0	4
Fair copy for the Court, per folio	0	0	4	0	0	4
Attending presenting petition ...	0	6	8	0	6	8
Paid	1	0	0	1	0	0
Copy petition for service, per folio	0	0	4	0	0	4
Service thereof on parties already on the record	0	2	6	0	2	6
Service on other parties	0	5	0	0	5	0
Mileage (as in cases of writs), per mile	0	1	0	0	1	0
Extra charge for service by agent in cases of personal service in country	0	7	0	0	7	0
Writing formal respondent that his costs for appearing on petition would be objected to	0	3	6	0	3	6
Attending him therewith and tendering him 1*l.* 10*s.*	0	6	8	0	6	8
Paid him	1	10	0	1	10	0
Attending respondent's solicitor with copy petition, obtaining acceptance of service, and undertaking to appear	0	6	8	0	6	8
Instructions for affidavit in support of petition	0	6	8	0	6	8
Drawing same, per folio	0	1	0	0	1	0
Fee to counsel to settle same and clerk						
Attending him						

	Lower Scale.			Higher Scale.		
	£	s.	d.	£	s.	d.
Ingrossing affidavit, per folio ...	0	0	4	0	0	4
Marking exhibits, each	0	1	0	0	1	0
Attending each deponent reading over same and with him to be sworn	0	6	8	0	6	8
Paid oath and exhibits						
Copy affidavit for office copy, per folio	0	0	4	0	0	4
Paid filing	0	2	6	0	2	6
Paid marking office copy, per folio	0	0	2	0	0	2
Notice of filing copy and service	0	4	0	0	4	0
For each additional notice ...	0	2	6	0	2	6
Paid for copy affidavit in opposition to petition, per folio	0	0	4	0	0	4
Perusing same, per folio	0	0	4	0	0	4
Close copy (if agency), per folio ...	0	0	4	0	0	4
Drawing observations for counsel, per folio	0	1	0	0	1	0
Two fair copies, per folio, each ...	0	0	4	0	0	4
Two copies petition for counsel, per folio, each	0	0	4	0	0	4
Two copies affidavits and exhibits and other documents to accompany, per folio, each	0	0	4	0	0	4
Fee to leading counsel with brief and clerk attending him ...						
If counsel's fee 1 guinea ...	0	3	4	0	6	8
If more and under 5 guineas ...	0	6	8	0	6	8
If 5 guineas and under 20 guineas	0	6	8	0	13	4
If 20 guineas	0	13	4	1	1	0
If 40 guineas or more				2	2	0
Paid him consultation fee and clerk	2	7	0	2	7	0
Attending him	0	6	8	0	6	8
Fee to junior counsel with brief and clerk						

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	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
Attending him						
Paid him consultation fee and clerk	1	3	6	1	3	6
Attending him	0	3	4	0	6	8
Attending consultation	0	13	4	0	13	4
Attending Court all day, but petition not reached	0	6	8	0	10	0
Attending Court when petition heard and order made as prayed (subject to petition being amended)	0	13	4	1	1	0
Or according to circumstances not to exceed	2	2	0	2	2	0
Attending bespeaking order ...	0	6	8	0	6	8
Close copy, per folio	0	0	4	0	0	4
Notice of settling same, copy, and service	0	4	0	0	4	0
For each additional notice ...	0	2	6	0	2	6
Attending settling order	0	13	4	0	13	4
Or in the taxing master's discretion not to exceed	1	1	0	3	3	0
Attending examining proof of order if printed (allowed to party having conduct of order only)	0	6	8	0	6	8
Notice of passing same, copy, and service	0	4	0	0	4	0
For each additional notice ...	0	2	6	0	2	6
Paid for order						
Attending passing same	0	6	8	0	13	4
Sittings fee	0	15	0	0	15	0
All letters and attendances to be charged on their proper dates at the usual rate.						
Copy order for chambers, per folio	0	0	4	0	0	4

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
Summons to proceed thereon and to raise costs under liberty to apply, fair copy, and attending issuing same	0	6	8	0	6	8
Paid stamp	0	3	0	0	3	0
Copy for chambers	0	2	0	0	2	0
Copy and service	0	3	6	0	4	6
Attending summons, order made (*fee allowed by master*).						
Attending bespeaking new certificate of fund for registrar ...	0	6	8	0	6	8
Paid	0	1	0	0	1	0
Close copy order, per folio ...	0	0	4	0	0	4
Notice of settling same, copy, and service	0	4	0	0	4	0
For each additional notice ...	0	2	6	0	2	6
Attending settling...	0	13	4	0	13	4
	to			to		
	1	1	0	3	3	0
Notice of passing order, copy, and service	0	4	0	0	4	0
Each additional notice	0	2	6	0	2	6
Examining print (allowed only to party having carriage of order)	0	6	8	0	6	8
Attending passing order	0	6	8	0	13	4
Drawing request to sell stock ...	0	2	6	0	2	6
Attending Paymaster-General therewith	0	6	8	0	6	8
Copy order for taxing master, per folio	0	0	4	0	0	4
Attending obtaining reference ...	0	6	8	0	6	8
Drawing bill of costs and copy, per folio	0	0	8	0	0	8
Drawing statement of parties and fair copy...	0	2	6	0	2	6

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	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
Or per folio	0	0	8	0	1	0
Attending taxing, per twenty-five folios	0	6	8	0	6	8
Certificate	0	11	8	0	11	8
Paid stamp	0	10	0	0	10	0
Paid taxing fee (this has to be inserted in the summary).						
Sittings fee (proper)	0	15	0	0	15	0
Sittings fee (agency)	1	1	0	1	1	0
Extra letters, etc. (*according to circumstances*).						

No. 42.

COSTS OF SUMMONS FOR CHARGING ORDER.

(*Title as in summons.*)

Costs of summons for charging order to be taxed as between solicitor and client under order dated , 190 .

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
Instructions for summons ...	0	6	8	0	13	4
Registering lis pendens *is not allowed on taxation.*						
Attending bespeaking certificate of fund	0	6	8	0	6	8
Paid	0	1	0	0	1	0
Drawing special summons, fair copy, and attending issuing ...	0 6 8 to 0 13 4			0 13 4 to 1 1 0		
Paid stamp...	0	3	0	0	3	0
Copy for chambers	0	2	0	0	2	0
Copy and service on parties already on the record	0	3	6	0	4	6

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
Copy and service on other parties	0	7	0	0	7	0
Mileage as in cases of writs, per mile	0	1	0	0	1	0
Extra charge for service by agent in cases of personal service in the country	0	7	0	0	7	0
Instructions for affidavit in support of summons	0	6	8	0	6	8
Drawing same, per folio	0	1	0	0	1	0
Fee to counsel and clerk to settle						
Attending him	0	6	8	0	6	8
Ingrossing affidavit, per folio ...	0	0	4	0	0	4
Marking exhibits, each	0	1	0	0	1	0
Attending deponent to be sworn, each	0	6	8	0	6	8
Paid oath and exhibits						
Copy affidavit for office copy, per folio	0	0	4	0	0	4
Paid filing	0	2	6	0	2	6
Paid marking office copy	0	0	2	0	0	2
Notice of filing, copy, and service...	0	4	0	0	4	0
Each additional notice	0	2	6	0	2	6
Paid for copy affidavits in opposition to summons, per folio ...	0	0	4	0	0	4
Perusing same, per folio	0	0	4	0	0	4
Close copy (in agency cases), per folio	0	0	4	0	0	4
Attending summons when same adjourned into Court (*fee fixed by master*).						

(*Here add charges for briefs to counsel, consultation, attendance in Court, settling and passing order, and subsequent proceedings thereon as in costs of petition*, ante, *p.* 171.)

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No. 43.

Costs of Summons for Stop Order in Aid of Charging Order or Lien.

(*Title as in summons or petition.*)

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
Instructions to obtain stop order	0	6	8	0	6	8
Attending bespeaking certificate of fund and afterwards for same	0	6	8	0	6	8
Paid	0	1	0	0	1	0
Summons for stop order, fair copy, and attending issuing same ...	0 6 8 to 0 13 4			0 13 4 to 1 1 0		
Paid stamp	0	3	0	0	3	0
Copy for chambers	0	2	0	0	2	0
Copy and service	0	3	6	0	4	6
Instructions for affidavit (where necessary)	0	6	8	0	6	8
Drawing same, per folio	0	1	0	0	1	0
Ingrossing same, per folio ...	0	0	4	0	0	4
Attending deponent to be sworn ...	0	6	8	0	6	8
Marking exhibit	0	1	0	0	1	0
Paid oath	0	1	6	0	1	6
Paid each exhibit	0	1	0	0	1	0
Paid filing	0	2	6	0	2	6
Copy for office copy, per folio ...	0	0	4	0	0	4
Paid marking copy, per folio ...	0	0	2	0	0	2
Notice of filing	0	4	0	0	4	0
Each additional notice	0	2	6	0	2	6
Attending summons order made (*fee fixed by master*).						
Close copy order, per folio ...	0	0	4	0	0	4
Notice of settling	0	4	0	0	4	0
Each additional notice	0	2	6	0	2	6

	Lower Scale. £	s.	d.	Higher Scale. £	s.	d.
Attending settling order ...	0	13	4	0	13	4
	to			to		
	1	1	0	3	3	0
Notice of passing order	0	4	0	0	4	0
Each additional notice	0	2	6	0	2	6
Examining print	0	6	8	0	6	8
Attending passing order	0	6	8	0	13	4
Paid stamp						
Attending Paymaster-General lodging order for entry	0	6	8	0	6	8

(*Here charge copy order for taxing master and costs of taxation, sittings fees, and letters, the same charges as in costs of petition*, ante.)

No. 44.

COSTS OF SUMMONS FOR CHARGING ORDER IN KING'S BENCH DIVISION.

(*Title as in summons.*)

(*The higher scale is practically never allowed in the King's Bench Division, so only lower scale items are given here.*)

	£	s.	d.
Instructions to apply for charging order *ex parte* on ground of urgency	0	6	8
Instructions for affidavit in support	0	6	8
Drawing same, per folio	0	1	0
Ingrossing same, per folio	0	0	4
Attending to be sworn	0	6	8
Marking exhibit	0	1	0
Paid oath and exhibit			
Attending master making application when order *nisi* made	0	6	8
Attending drawing up order	0	6	8
Paid	0	5	0

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	£	s.	d.
Close copy (if agency)	0	1	0
Paid filing affidavit	0	2	6
Copy and service of order on all parties to action, each	0	3	6
On other parties, each	0	6	0
Mileage in each case, per mile (as on service of writ)	0	1	0
Extra charge for service by agent in cases of personal services in country	0	7	0
On receipt of summons to discharge order.			
Perusing affidavit in support, per folio ...	0	0	4
Close copy (if agency), per folio	0	0	4
Instructions for affidavit in opposition ...	0	6	8
Drawing same, per folio	0	1	0
Ingrossing, per folio	0	0	4
Marking exhibit, each	0	1	0
Attending to be sworn	0	6	8
Paid oath and exhibit			
Paid filing	0	2	6
Copy for other side, per folio	0	0	4
On receipt of affidavit in reply perusing same, per folio	0	0	4
Close copy (if agency), per folio	0	0	4
Notice of attending summons by counsel ...	0	4	0
Attending putting summons in counsel's list	0	3	4
Brief to counsel to attend	0	6	8
Copies of affidavits and exhibits for him, per folio	0	0	4
Fee to counsel and clerk	2	4	6
Attending him	0	6	8
Attending appointing conference	0	3	4
Fee to him and clerk	1	6	0
Attending conference	0	13	4
Attending summons when application to discharge charging order refused with costs and counsel certified for	0	6	8

	£	s.	d.
Attending drawing up order	0	6	8
Paid	0	5	0
Close copy (if agency), per folio	0	0	4
Copy order for service, per folio	0	0	4
Service, charge as above.			
Copy order for taxing master, per folio ...	0	0	4
Attending obtaining reference	0	6	8
Drawing statement of parties	0	2	6
Drawing bill of costs and two copies, per folio	0	1	0
Attending taxing, for every twenty-five folios	0	6	8
Certificate and paid	1	1	8
Paid taxing fee (insert this in summary).			
Sittings fee	0	15	0
Sittings fee (agency)	1	1	0
Letters, &c. (according to circumstances).			

No. 45.

COSTS IN BANKRUPTCY OF APPLICATION FOR CHARGING ORDER.

(*Title as in order.*)

Costs of application to be taxed under order dated , 189 .

	£	s.	d.
Instructions to apply for charging order ...	0	13	4
Instructions for affidavit in support	0	6	8
Drawing same, per folio	0	1	0
Ingrossing same, per folio	0	0	4
Attending deponent to be sworn	0	6	8
Preparing exhibits, each	0	1	0
Paid oath and exhibits			
Attending filing	0	6	8
Paid	0	2	0
Drawing and copy application	0	5	0

Appendix I.

	£	s.	d.
Paid	0	5	0
If counsel employed charge for brief, copies of documents, fee, and attendance on him.			
Attending Court application granted	1	0	0
Drawing order and two copies and attending to get same signed and sealed	0	6	8
Service thereof	0	5	0
If application made to discharge order add the following items:			
Perusing notice of motion, per folio	0	0	4
Perusing affidavit in support, per folio ...	0	0	4
Here charge affidavit in reply—similar items to first affidavit (above).			
Copy affidavit for other side, per folio ...	0	0	4
Instructions for brief (if counsel instructed)			
Drawing same, per folio	0	1	0
Fair copy, per folio	0	0	4
Copies of the following documents for counsel:			
Notice of motion, per folio	0	0	4
Affidavit in support, per folio	0	0	4
Affidavit in opposition, per folio	0	0	4
Affidavit in reply, per folio	0	0	4
Exhibits, per folio	0	0	4
Charging order, per folio	0	0	4
Other necessary or proper papers, per folio...	0	0	4
Fee to counsel and clerk			
Attending him	0	6	8
Attending appointing conference	0	3	4
Conference fee to him and clerk	1	6	0
Attending conference	0	13	4
Attending hearing when application to discharge refused with costs	0	13	4
Drawing and copy order and attending to get same signed and sealed	0	6	8
Copy for service, per folio	0	0	4
Service	0	5	0

	£	s.	d.
Drawing costs for taxation and two copies, per folio	0	1	0
Copy for other side, per folio	0	0	4
Attending for appointment to tax	0	6	8
Service thereof	0	5	0
Attending taxing	0	6	8
Letters, messengers, &c.	0	10	0
Paid for allocatur			

No. 46.

Appellant's Costs of Appeal in Bankruptcy.

In the Court of Appeal,
Bankruptcy.

In the matter, &c. (*as in order*).

Costs of appellant to be taxed under order dated , 19 .

	£	s.	d.
Instructions to appeal	0	13	4
Drawing notice of appeal, per folio	0	1	0
Fee to counsel and clerk to settle (*if necessary*)	1	3	6
Attending him	0	3	4
Attending setting down appeal	0	6	8
Attending paying 20*l.* deposit into Court ...	0	6	8
Three copies notice of appeal for the Court, per folio	0	0	4
The like order, per folio	0	0	4
Copy notice for service, per folio	0	0	4
Service thereof	0	5	0
Mileage, per mile	0	1	0
Writing the registrar of the county court for office copy evidence and instructing him to forward the papers to London	0	3	6
Paid for office copy evidence			

Appendix I.

	£	s.	d.
Instructions for brief	1	1	0
	or more		
Drawing same, per folio	0	1	0
Fair copy, per folio	0	0	4
Copy notice of appeal, orders, and other necessary documents for counsel, per folio	0	0	4
London agent perusing documents ...	1	1	0
	to		
	2	2	0
Fee to leading counsel with brief and clerk			
Attending him	0	6	8
Consultation fee to him and clerk	2	7	0
Attending him	0	6	8
Fee to junior counsel with brief and clerk ...			
Attending him	0	6	8
Consultation fee to him and clerk	1	3	6
Attending him	0	3	4
Attending consultation...	0	13	4
Attendances searching list of appeals ...	0	13	4
Attending Court case not reached	0	6	8
Attending Court appeal heard and allowed with costs	0	13	4
	to		
	2	2	0
Drawing order, per folio	0	1	0
Fair copy for respondent, per folio	0	0	4
Notice to settle order	0	5	0
Copy for the Registrar to settle, per folio ...	0	0	4
Attending settling	0	13	4
Ingrossing order, per folio	0	0	4
Attending for same signed	0	6	8
Paid stamp thereon			
Copy for service, per folio	0	0	4
Service thereof	0	5	0
Copy order for taxing master, per folio ...	0	0	4
Drawing costs and copies			
Copy for respondent's solicitor, per folio ...	0	1	0

	£	s.	d.
Attending for appointment to tax	0	6	8
Notice thereof	0	5	0
Attending taxing	0	6	8
Letters, &c.	0	10	0
Paid for allocatur			

No. 47.

RESPONDENT'S COSTS OF APPEAL IN BANKRUPTCY.

(*Heading and title as in appellant's costs*, ante.)

	£	s.	d.
Instructions to oppose appeal	0	13	4
Perusing notice	0	6	8
Or per folio	0	0	4
Writing Registrar of the county court for office copy evidence	0	3	6
Paid for same			
Attendances searching cause list	0	13	4
London agent perusing documents	1 to 2	1 to 2	0 0

(*The remaining charges will be the same as in appellant's costs*, ante.)

APPENDIX II.

On reading the old decisions as to set-off the practice of the Court of Chancery, and of the Court of Exchequer when sitting in equity, appears to have been in some cases to limit the solicitor's lien to the ultimate balance coming to his client after deducting all monies payable to the opposite party, whether for damages, costs, or otherwise, in the same suit (Jessel, M.R., followed this practice in *Pringle* v. *Gloag*, (1879) 10 C. D. 676 App.): *Bawtree* v. *Watson*, 2 Keen, 713; *Taylor* v. *Popham*, (1808) 15 Ves. 75 (Eldon, C.); *Cattell* v. *Simons*, 6 Beav. 304; *Gurish* v. *Donovan*, 2 Atk. 165 (Lord Hardwicke); *Exp. Rhodes*, 15 Ves. 541 (Eldon); *Harmer* v. *Harris*, (1826) 1 Russ. 155.

Courts of equity also sometimes disregarded the solicitor's lien in setting off costs of an action at law against costs of a suit in equity where the subject matter of both proceedings was substantially the same, *e.g.*, an action of ejectment and a suit to be quieted in possession: *Shine* v. *Gough*, (1811) 2 Ball & B.; *Taylor* v. *Cooke*, (1830) You. 201.

There are, however, certain decisions and dicta of equity Judges to the effect that the solicitor's lien ought to be respected before allowing a set-off, as follows:— *Hall* v. *Ody*, (1799) 2 B. & P. 29; *Smith* v. *Brocklesby*, 2 Yo. & J. 70; *Irving* v. *Viana*, 2 Yo. & J. 70; *Wright* v. *Mudie*, (1823) 1 Sim. & S. 266 (Leach); *Williams* v. *Edwards*, (1829) 2 Sim. 83; *Throckmorton* v. *Crowley*, L. R. 1867, 3 Eq. 196.

In the King's Bench the lien of the plaintiff's attorney was respected before allowing a set-off of one judgment

against another: *Simpson* v. *Lamb*, (1857) 26 L. J. Q. B. 121, 124; *Mitchell* v. *Oldfield*, (1791) 4 T. R. 123; *Morland* v. *Lashley*, cited in H. Bl. 441 (1794); *Randle* v. *Fuller*, (1795) 6 T. R. 456; *Glaister* v. *Hewer*, (1798) 8 T. R. 69; *Middleton* v. *Hill*, (1813) 1 M. & S. 240; *Harrison* v. *Bainbridge*, (1824) 2 B. & C. 800; *Stephens* v. *Weston*, (1824) 3 B. & C. 535; *Alliance Bank* v. *Holford*, (1864) 16 C. B. N. S. 460; *Little* v. *Philpotts*, (1862) 2 B. & S. 583.

In the Common Pleas the attorney's lien was always disregarded, and one judgment was allowed to be set off against another without providing for such lien except to the extent of the balance between the two amounts: *Roberts* v. *Biggs*, Barnes, C. P. Rep. 146; *Roberts* v. *Mackoul* (cited in 2 Blackst. 827); *Schoole* v. *Noble*, (1788) 1 H. Bl. 24; *Nunez* v. *Modigliani*, (1789) 1 H. Bl. 217; *Vaughan* v. *Davies*, (1795) 2 H. Bl. 440; *Hall* v. *Ody*, (1799) 2 B. & P. 28; *Emdin* v. *Darley*, (1804) 1 N. R. 22; *Brown* v. *Sayce*, (1812) 4 Taunt. 230; *Figes* v. *Adams*, (1812) 4 Taunt. 632; *Lomas* v. *Mellor*, (1820) 5 Moo. 95; *Bourne* v. *Bennett*, (1827) 4 Bing. 423; and even where the judgments were in different Courts (*e.g.*, King's Bench and Common Pleas), it made no difference: *Bridges* v. *Smyth*, (1831) 8 Bing. 29.

On the common law side of the Exchequer the decisions are conflicting. In *Gifford* v. *Gifford*, (1801) Forr. 109, the King's Bench practice was followed, but in the following cases that of the Common Pleas was adopted: *Murphy* v. *Cunningham*, 1 Anst. 271; *Lane* v. *Pearce*, (1823) 12 Price, 742.

All the Courts set off costs against costs or damages or both awarded in the same action without regard to the attorney's lien: *George* v. *Elston*, (1835) 1 Bing. N. C. 513; *Lees* v. *Reffitt*, (1835) 3 A. & E. 707; *Dunn* v. *West*, (1850) 10 C. B. 204.

All the Courts were in the habit of deducting interlocutory costs. The reason for this was tersely put by

Appendix II.

Lord Ellenborough thus: "The attorney's lien is entire; he has not one lien upon the costs of the declaration, another upon the costs of the plea, and so forth": *Howell* v. *Harding*, (1807) 8 East, 362; *Bryon* v. *Metropolitan Saloon Omnibus Co.*, (1859) 29 L. J. Ch. 798, Kindersley.

Many of these cases were reviewed and followed in a recent case in the Irish Court of Appeal, and, if we may say so respectfully, we think that decision, *McCormack* v. *Ross*, (1894) 2 I. R. 545, would be adopted in the English Courts.

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